FILED

(1) 02 561 OCT 07 2002

OFFICE OF THE CLERK

No. 02-

IN THE

Supreme Court of the United States

HARRY BROWNE and PETER SCHMERL,

Petitioners,

v.

BETSEY BAYLESS, Secretary of State of Arizona,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

PETITION FOR WRIT OF CERTIORARI

NANCY NORTHUP
Counsel of Record
KIM BARRY
BRENNAN CENTER FOR JUSTICE
AT NEW YORK UNIVERSITY SCHOOL OF LAW
Attorneys for Petitioners
161 Avenue of the Americas
12th Floor
New York, New York 10013
(212) 998-6730

176548

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

94 pp
9.50

QUESTION PRESENTED

Whether a state may, consistent with the First and Fourteenth Amendments as construed in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), require an independent candidate for President of the United States to qualify for the ballot almost five months before the general election and three months before an established political party must designate its presidential candidate, where the state admits that it does not need that amount of time for its election administration.

PARTIES TO THE PROCEEDING BELOW

In addition to the Petitioners and Respondent as listed in the caption, Marcene Candelaria was a plaintiff below.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceeding Below	ii
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	ix
Opinions Below	1
Statement of Jurisdiction	1
Statutory and Constitutional Provisions Involved	1
Statement of the Case	2
A. Arizona's Ballot Access Scheme for Presidential Electors and Candidates.	3
B. Harry Browne's 2000 Candidacy for President	6
C. Procedural History	9
1. Superior Court	9
2. Arizona Court of Appeals	9
3. Arizona Supreme Court	10

Contents

	Page
Reasons for Granting the Petition	11
I. The Question of Whether a State May, Consistent with Free Speech and Associational Rights, Require an Independent Presidential Candidate to Qualify for the Ballot Substantially in Advance of When a Political Party Must Designate Its Candidate Is One of National Importance Warranting This Court's Review and Resolution Before the 2004 Presidential Election.	11
II. The Arizona Supreme Court's Ruling Conflicts with This Court's Holding in *Anderson v. Celebrezze*.	15
Conclusion	24

TABLE OF CITED AUTHORITIES

Page

Cases:

American Party of Texas v. White, 415 U.S. 767 (1974) 21

Anderson v. Celebrezze, 460 U.S. 780 (1983) .... *passim*

Anderson v. Celebrezze, 499 F. Supp. 121 (S.D. Ohio 1980), *aff'd* 460 U.S. 780 (1983) 14

Anderson v. Hooper, 498 F. Supp. 898 (D. N.M. 1980) 14-15

Anderson v. Morris, 500 F. Supp. 1095 (D. Md. 1980), *aff'd* 636 F.2d 55 (4th Cir. 1980) 15

Anderson v. Quinn, 495 F. Supp. 730 (D. Me. 1980) 14, 20

Arizona Libertarian Party v. Schmerl, 28 P.3d 948 (Ariz. Ct. App. 2001) 7

Bullock v. Carter, 405 U.S. 134 (1972) 14

Burdick v. Takushi, 504 U.S. 428 (1992) 13, 20

Bush v. Gore, 531 U.S. 98 (2000) 11, 13

Campbell v. Hull, 73 F. Supp. 2d 1081 (D. Ariz. 1999) 14

Cited Authorities

	Page
Cousins v. Wigoda, 419 U.S. 477 (1975)	15
Dunn v. Blumstein, 405 U.S. 330 (1972)	17
Greaves v. Mills, 497 F. Supp. 283 (E.D. Ky 1980), *aff'd in part and rev'd in part by Anderson v. Mills*, 604 F.2d 600 (6th Cir. 1981)	14
Jenness v. Fortson, 403 U.S. 431 (1971)	21
Libertarian Party v. Davis, No. CV 84-0262 (M.D. Pa., June 1, 1984)	12
Nader 2000 Primary Committee, Inc. v. Hazeltine, 110 F. Supp. 2d 1201 (D. S.D. 2000), *aff'd* 226 F.3d 979 (8th Cir. 2000)	14
Norman v. Reed, 502 U.S. 279 (1992)	15, 23
Storer v. Brown, 415 U.S. 724 (1974)	21
Williams v. Rhodes, 393 U.S. 23 (1968)	17
United States Constitution:	
First Amendment	i, 1
Fourteenth Amendment	i, 1

Cited Authorities

Page

Statutes:

A.R.S. § 15-351 3

A.R.S. § 16-201 3

A.R.S. § 16-211 4

A.R.S. § 16-212 4

A.R.S. § 16-311 ..... 3, 4, 5

A.R.S. § 16-312 8

A.R.S. § 16-341 ..... 1, 3, 4, 5, 6, 8, 14

A.R.S. § 16-344 4

A.R.S. § 16-507 5

A.R.S. § 16-545 18

A.R.S. § 16-804 5

Ohio Rev. Code § 3505.10 (Supp. 1980) 16

Ohio Rev. Code § 3513.25.7 (Supp. 1980) 16

Tex. Elec. Code Ann. § 181.005(e) 4

Tex. Elec. Code Ann. § 181.061(c) 4

28 U.S.C. § 1257(a) 1

Cited Authorities

Page

Other Authorities:

Arizona Sec'y of State, *2000 Elections Information, available at* http://www.sosaz.com/election/PreviousYears.htm. 3-4

40 Fed. Reg. 43746 (Sept. 23, 1975) 22

2000 Presidential Candidates on General Election Ballots, http://www.fec.gov/pages/2000geballot.htm 7, 8

Repub. Nt'l Conv., *Republicans to Begin 2004 National Convention on August 30th, available at* http://www.rnc.org/newsroom/Releases/May02/2004GOPConvention.htm 13

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The Supreme Court Of The State Of Arizona Filed May 24, 2002 ..... 1a

Appendix B — Opinion Of The Court Of Appeals Of Arizona, Division One, Department B Filed May 29, 2001 ..... 13a

Appendix C — Minute Entry Of The Superior Court Of Arizona For Maricopa County Dated September 8, 2000 ..... 25a

Appendix D — Statutory Provisions Involved 29a

Appendix E — Letter From The State Election Director To Peter G. Schmerl Dated June 20, 2000 ..... 35a

Appendix F — Affidavit Of State Election Director, J.G. Funkhouser, Dated August 31, 2000 ..... 37a

Appendix G — Affidavit Of Joseph W. Dehn III Dated August 35, 2000 ..... 49a

Appendix H — Affidavit Of Richard Winger Dated August 17, 2000 ..... 51a

Appendix I — Supplemental Affidavit Of Richard Winger Dated September 5, 2000 ..... 56a

OPINIONS BELOW

The opinion of the Arizona Supreme Court is reported at *Browne v. Bayless*, 46 P.3d 416 (Ariz. 2002) (en banc), and is set forth in Appendix ("App.") A. The opinion of the Arizona Court of Appeals is reported at *Browne v. Bayless*, 200 Ariz. 261, 25 P.3d 749 (Ariz. Ct. App. 2001), and is set forth in App. B. The opinion of the Superior Court in Maricopa County is unreported and set forth in App. C.

STATEMENT OF JURISDICTION

The Arizona Supreme Court entered its judgment on May 24, 2002. On August 14, Justice Sandra Day O'Connor extended the time within which to file a petition for a writ of certiorari to and including Sunday, October 6, 2002. Pursuant to Supreme Court Rule 30, this petition must be filed on or before Monday, October 7, 2002.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment to the United States Constitution

Fourteenth Amendment to the United States Constitution

Arizona Revised Code Annotated ("A.R.S.") § 16-341 (set forth in relevant part in App. D)

STATEMENT OF THE CASE

This case presents the issue whether a state may require an independent candidate for President of the United States to qualify for the ballot almost five months before the general election and three months before an established political party is required to designate its presidential candidate. For over eighty years, Arizona had allowed independent candidates for President to petition for access to the November general election ballot in September, after the political parties had held their conventions and nominated their candidates. Between 1993 and 1999, Arizona moved back by one hundred days the qualifying deadline for independent candidates, although the state acknowledges that it does not need that lengthy period to prepare the general election ballot. This mid-June deadline is the second earliest in the nation, and no independent presidential candidates have appeared on the Arizona November ballot since the backward creep began in 1993. No longer can voters dissatisfied with the presidential candidates and platforms emerging from the national party conventions, or otherwise reacting to unanticipated political events, turn to the alternate route of supporting an independent candidate on the general election ballot.

The Arizona Court of Appeals unanimously held that the June 14 deadline places a heavy burden on independent candidates and their supporters that is unjustified by any substantial state interest. The Arizona Supreme Court reversed in an opinion that is in conflict with this Court's decision in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and the interpretation of that decision by numerous states that have moved their independent presidential candidate deadlines closer to the November election. The question is of national importance, because in the context of presidential elections the

ballot access rules of one state affect the choices of voters throughout the nation. This petition respectfully requests the Court to exercise its certiorari jurisprudence to settle the question presented in advance of the 2004 presidential election.

A. Arizona's Ballot Access Scheme for Presidential Electors and Candidates.

Since 1909, Arizona law provided for independent candidates for President of the United States to file their nomination papers in late September, ten days after the state's primary, forty-six days before the general election. (App. H at 52-53.) In 1993, the legislature pushed back the deadline to seventy-five days before the primary; in 1999, Arizona pushed it back even further, to ninety days before the primary.[1] In the 2000 election, because the general election fell on November 7, the primary election was on September 12 (for offices other than President), and the independent candidate petitioning deadline was June 14.[2] (*See* Arizona Sec'y of State, *2000*

1. The 1993 setback was one of several changes to the ballot access process for independent candidates. The legislative history does not directly address why the deadline was moved back 85 days. (*See* Defs.' Resp. to Special Action at 19, *Browne v. Bayless*, No. CV-00-0327 (Ariz. Sup. Ct., filed Sept. 12, 2000).) The 1999 amendment was designed to allow additional time for investigation, court action, and resolution of any challenges to the nominating petitions of candidates running in the September primary. (*Id.* at 20.) Its indirect affect was to move the filing deadline back for all candidates, including presidential, regardless of whether or not they actually participate in the primary.

2. The statute ties the candidate filing deadline to the date of the primary, which is not affixed to a calendar date. The primary takes place eight weeks prior to the general election, A.R.S. § 16-201, and the filing deadline is 90 days before that. A.R.S. § 16-311(A) (App. D at 29-30), 16-341(C) (App. D at 31.) A general election that includes a presidential

(Cont'd)

Elections Information, *available at* http://www.sosaz.com/election/PreviousYears.htm.) Arizona now has the second earliest filing deadline in the country for independent presidential candidates.[3] Since the earlier deadline went into effect, no independent candidate for President has appeared on the general election ballot in Arizona. (App. F at 40.) The filing deadline for presidential candidates is tied to the date of the primary election even though those candidates do not participate in the primary in any way.

The earlier designation date for independent candidates applies to candidates for any office in Arizona, not just those running for President, but its effect in the presidential races is markedly different because of the nature of that election. In presidential contests, the nomination paper is filed not by a specific candidate, but by a slate of presidential electors. A.R.S. §§ 16-311(E), 16-341(G). (App. D at 30, 32-33.) The law requires that, in order for any presidential candidate's name to appear on the state's general election ballot, his or her supporters must file nomination papers with the Secretary of State not less than 90 days before the primary election. A.R.S. §§ 16-311(A) (App. D at 29-30); A.R.S. § 16-344. The nomination paper is filed by a slate of presidential electors who, if elected, will cast

---

(Cont'd)

vote takes place on the first Tuesday after the first Monday in November every four years, starting with 1956 as a base year. A.R.S. §§ 16-211, 16-212. As the present case concerns the 2000 general election, this petition throughout refers to the dates on which these events occurred in that year. The dates will change for future elections, but the number of days between relevant events will remain constant.

3. Texas has the nation's earliest deadline, which in 2000 fell on May 30, according to a statutory formula setting it at 75 days after precinct conventions. Tex. Elec. Code Ann. §§ 181.005(e), 181.061(c).

a vote in the electoral college to select the President.[4] A.R.S. §§ 16-311(E) (App. D at 30), 16-341(G) (App. D at 32-33), 16-344.

Although all electors — whether for independent candidates or political party candidates — have to be identified by June 14, the statute fixes no time by which electors named by political parties[5] have to identify their "preferred" presidential candidate (that is, the party candidate). (App. A at 5.) This odd statutory lapse is filled in the record by an affidavit from the State Election Director, who explains that, in practice, the chair of each state party committee notifies the Secretary of State by letter of its candidate for President some time "after the national conventions" in August.[6] (App. F at 47; App. G at 50; App. B at 19) (noting that "when these letters arrive and whether

---

4. The slate of electors appears on the general election ballot above their "preference" for the office of President. A.R.S. § 16-507. For example, in 2000, the Republican Party's electors' names appeared on the ballot in small type, and their preference, George W. Bush, appeared underneath their names in bold type. Arizona voters who wanted George W. Bush to be elected President voted for the electors who identified their preference for George W. Bush.

5. This case is concerned only with "qualified" political parties defined by statute as those parties that receive a specified number of votes in the previous election or have a specified number of voters registered as members of the party. A.R.S. § 16-804. In Arizona in 2000, qualified parties included the Democratic, Republican, and Libertarian parties. An independent candidate does not have the formal endorsement of a political party in the state.

6. The 2000 Democratic and Republican Conventions ran from August 14 through August 17, and July 31 through August 3, respectively. The Libertarian Party National Convention took place from June 30 through July 2.

they are filed is unknown.").) Arizona law gives no guidance to the Secretary of State regarding how she is to determine which party presidential candidate will appear as party nominee on the general election ballot. Again, the Secretary of State has compensated for this statutory silence by developing a practice: she places on the ballot the name of the winner of the party convention, as reported to her by the state party committee chair. (App. F at 47, 48.) In 2000, the Secretary of State accepted names of party candidates at least as late as September 6. (*See* Letter from Funkhouser to Sec'y, Ariz. Libertarian Party, Exh. 5 to App. for Temp. Restraining Order, *Browne v. Bayless*, No. CV 2000-015468 (Ariz. Superior Ct., filed Aug. 17, 2000).)

The statutory requirements for independent candidates and their electors are decidedly more exacting. By June 14, electors supporting an independent presidential candidate are required to file a nomination petition identifying not only themselves, but also their candidate for President. *See* A.R.S. § 16-341(C) (App. D at 31). In addition, by June 14 electors' nomination petition for their named candidate must be signed by three percent of qualified electors not registered as members of a recognized political party (9,598 people in 2000). A.R.S. § 16-341(E) (App. D at 32). Although the deadline for filing the required papers is June 14, the independent must decide to run well in advance of that filing deadline in order to be in a position to gather the almost 10,000 requisite signatures.

B. Harry Browne's 2000 Candidacy for President

Petitioner, Harry Browne sought to run for President in 2000. A member of the Libertarian Party, Browne announced early in 2000 to seek that party's presidential nomination at its national convention. On February 22, 2000, Browne won

78% of votes cast for Libertarian candidates at Arizona's non-binding presidential primary. (*See* Defs.' Stmt of Facts in Support of Opp. to Injunctive Relief, Exh. 9, *Browne v. Bayless*, No. CV-2000-015468, Ariz. Superior Ct., filed Sept. 1, 2000.) On June 14, 2000, as part of a nationwide campaign to place Browne on the ballot in each state, Browne supporters submitted a letter to Arizona's Secretary of State, Betsey Bayless, designating a slate of presidential electors and their nomination papers. (App. E at 35.) However, another slate of electors had been filed by Elizabeth Brandenburg-Andreasen, who claimed that she was the head of Arizona's Libertarian Party. (App. E at 35.) On June 20, Bayless rejected Browne's papers because they were submitted by a person, Peter Schmerl, who she erroneously deemed was not the official head of the Libertarian Party in Arizona. (App. E at 36.) *See also Arizona Libertarian Party v. Schmerl*, 28 P.3d 948 (Ariz. Ct. App. 2001) (effectively upholding Schmerl's claim to office of State Chair of the Libertarian Party in Arizona).

Browne was faced with the unanticipated event that he would not be on the ballot in Arizona, despite having won the non-binding primary in Arizona and the Libertarian Party's nomination at its national convention. On July 16, 2000, Browne announced his intention to pursue an independent candidacy.[7] It is not at all unusual for non-major party candidates to use a mixture of minor party and independent candidacies to get on the ballot in various states. *See, e.g., 2000 Presidential Candidates on General Election Ballots*, http://www.fec.gov/pages/2000geballot.htm (in 2000, Buchanan appeared on the ballot in five different ways: as an independent candidate in eight states, the Reform Party candidate in 37 states, and, in one state each, the

7. (*See* Pls.' Resp. to Questions from Def., *Browne v. Bayless*, No CV 2000-015468 at 2 (Ariz. Superior Ct. Sept. 1, 2000).)

candidate for the Citizens First Party, the Freedom Party, and the Right to Life Party; Nader appeared on ballot as an independent candidate in five states, Green Party candidate in 37 states, and United Citizens Party candidate in one state). Given the lack of uniformity across states of filing deadlines, petition signature requirements, and other ballot access provisions for independent and minor party candidates, this combination of endorsements is unremarkable.

On August 17, 2000, attempting to qualify him as an independent, Browne's supporters submitted 21,058 signatures and a designation of electors to the Secretary of State. In so doing, Browne met the substantive requirements for a place on the ballot as an independent candidate if the papers had been filed on June 14, 2000 — the date Browne's Libertarian Party electors had been filed. The Secretary of State refused to accept Browne's designation of electors, this time because they were filed after the June 14 deadline.

The day after his petitions were refused, Browne filed suit in state court seeking a temporary restraining order, injunctive relief, and a declaratory judgment that A.R.S. § 16-341 was unconstitutional. Browne was joined by Peter Schmerl, a registered voter in Arizona who would have voted for Browne if his name had appeared on the general election ballot, and by Marcene Candelaria, a candidate for presidential elector in support of Harry Browne's candidacy for President.[8]

At the 2000 general election, in every state — except Arizona — voters had the choice of voting for Harry Browne for President. *See 2000 Presidential Candidates on General Election Ballots*, http://www.fec.gov/pages/2000geballot. htm.

---

8. Browne did not attempt to use Arizona's provision for independent "write-in" candidacies, A.R.S. § 16-312.

(Browne appeared on the ballot in 48 states and the District of Columbia as the Libertarian Presidential candidate, and as an independent in North Dakota.)

C. Procedural History

1. Superior Court

The Superior Court for Maricopa County denied Plaintiffs' requests in a Minute Entry on September 8, 2000. (App. C at 25-28.) The court held that the burden imposed by the June 14 deadline was not severe, and therefore the state needed to show only a rational basis for the early deadline. (App. C at 27.) The court found that the state's interest in more widespread use of early balloting and in meeting its administrative burden was sufficient to sustain the statute's constitutionality. (App. C at 28.) Following a denial of Plaintiffs' request for Special Action in the Arizona Supreme Court to require the Secretary of State to accept the Browne nominating petition, the Superior Court dismissed the complaint on October 5, 2000.

2. Arizona Court of Appeals

The Court of Appeals for Arizona, in a unanimous opinion, reversed. (App. B.) Recognizing that "the *Anderson* facts closely mirror the facts of this case," the Court of Appeals "adopt[ed] and appl[ied] its analysis to Browne's situation." (App. B at 18.) First, the court examined the character and magnitude of the burden imposed on voters by the early filing deadline for independent presidential candidates. The statute was burdensome, according to the court, because although the deadline was facially equal, its effect was to "treat[] differently-situated [sic] candidates alike

in a way that can be grossly discriminatory." (App. B at 19.) By allowing major parties to pick their candidates in August at national conventions, but forcing independent candidates to be qualified for the ballot earlier, the statute gave major parties "the advantage of continued strategic flexibility" over independents "locked in by the June 14 deadline." (App. B at 19-20) (footnote omitted).) The court concluded that, as in *Anderson*, the early deadline here imposed a "suspect burden" by discriminating against candidates and voters "'whose political preferences lie outside the existing political parties.'" (App. B at 20) (quoting *Anderson*, 460 U.S. at 703-94).) Moreover, the statutes tied the deadline for independent candidates to party primary elections even though such candidates do not participate in them. Second, the court examined the state's proffered interests in the early deadline to determine whether they were sufficiently narrowly drawn to justify the suspect burden and concluded they were not. (App. B at 21.) The court found that because the Secretary of State could prepare the ballot in time for the general election even if candidates filed papers after June 14, the statute was too broadly drawn: "The convenience of performing these administrative tasks before they need to be done is a trivial interest compared to the heavy burden the June 14 deadline places on independent candidates." (App. B at 22.)

3. Arizona Supreme Court

The en banc Arizona Supreme Court reversed. (App. A.) The court acknowledged that *Anderson* "involv[ed] similar facts" (App. A at 5), but distinguished it based on Arizona's later filing deadline, the purported trend toward earlier presidential primaries and candidate identification, and the fact that Browne's supporters were still able to vote for the

Libertarian Party slate of electors, albeit not him. (App. A at 7-8.) These distinctions, according to the court, made Arizona's law less burdensome and subject only to rationality review. (App. A at 9). While the court noted the Secretary of State's concession that she did not need the entire 146 day period to complete her election year duties (App. A at 9), the court nevertheless held that the June 14 deadline was reasonable and rationally related to the state's legitimate interest in ensuring an orderly resolution of any challenges to the ballot before it was composed, printed, and distributed. *Id.* at 420 (App. A at 11).

REASONS FOR GRANTING THE PETITION

I. The Question of Whether a State May, Consistent with Free Speech and Associational Rights, Require an Independent Presidential Candidate to Qualify for the Ballot Substantially in Advance of When a Political Party Must Designate Its Candidate Is One of National Importance Warranting This Court's Review and Resolution Before the 2004 Presidential Election.

Every four years, the nation undergoes the process of electing the President of the United States. The importance of this election to "the welfare and safety of the whole people cannot be too strongly stated.'" *Bush v. Gore*, 531 U.S. 98, 112 (2000) (citation omitted). Restrictions on access to the ballot for independent presidential candidates intrude upon the integrity of the process by which the nation selects its only national leaders. As this Court recognized in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), it is only in the presidential election that the voters of each state are inextricably bound to the voters of every other state in the

determination of a single, nationwide outcome. *Id.* at 794-95. The decision below permits a single state to interfere with this national process, by upholding an unjustifiably early and discriminatory filing deadline for independent presidential candidates. As presidential elections occur every four years, the issue of what constitutes an impermissibly early filing deadline for independent candidates will recur, as the inevitably unpredictable events of a campaign unfold. Whether supporters of an independent candidate can express that support at the ballot will vary from state to state, and where they cannot, voter choice throughout the nation is burdened, even in those states where the candidate is on the ballot. *See id.* at 795 n.19 ("Ohio's deadline, by denying [independent candidate] Anderson a place on the ballot, removes the sixth largest slate of electors from Anderson's reach and thereby reduces the total pool of electoral votes for which he may compete nationwide by 25 electors.").

There is no uniformity in the presidential election process regarding deadlines for independent candidates to qualify for the November ballot. The vast majority of states let independent candidates qualify for the ballot in August and September, but two, Arizona and Texas, impose deadlines before June 15. (App. I (Chart, *Deadlines for Independent and New Party Candidates*).) Following this Court's decision in *Anderson v. Celebrezze*, with its plain statement regarding the unconstitutionality of early filing deadlines, 460 U.S. at 806, several states moved their deadlines to later in the election cycle. *See, e.g., Libertarian Party v. Davis*, No. CV 84-0262 (M.D. Pa., June 1, 1984) (consent decree setting filing deadline at August 1); (App. H at 54). But Arizona has crept its independent candidate deadline earlier, thereby constricting the ability of candidates and voters to react to developments in the presidential election process, including

dissatisfaction with the candidates and platforms of established political parties at their conventions, by turning to an independent candidate.[9]

Independent candidates and their supporters will continue to play a crucial role in our democracy. The restriction the June 14 deadline places on independent candidacies affects a significant number of voters. The recent electoral support of non-major party candidates from Pat Buchanan to Ross Perot to Ralph Nader, reflects the fact that many voters are dissatisfied with major party offerings. They, as much as registered Democrats and Republicans, are entitled to the opportunity to cast a meaningful ballot. The fact that independent candidates are longshots makes no difference. "The right to vote for one's preferred candidate exists regardless of the likelihood that the candidate will be successful." *Burdick v. Takushi*, 504 U.S. 428, 447 (1992) (Kennedy, J., dissenting). Indeed, the June 14 deadline impinges on the right of *all* voters by "limit[ing] the field of candidates from which [they] might choose," *Anderson*, 460 U.S. at 786.

"When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental. . . ." *Bush v. Gore*, 531 U.S. at 104. In order to be meaningful, that right must translate into political opportunity for both candidates and voters. Arizona's restrictive ballot access law prevents independent candidacies from developing later in the electoral season

9. The burden only increases as major parties push their national conventions to later in the election cycle. *See* Repub. Nt'l Comm., *Republicans to Begin 2004 National Convention on August 30th*, *available at* http://www.rnc.org/newsroom/Releases/May02/2004GOPConvention.htm.

"when major party platforms are more established, voter interest increases, and disenfranchised voters begin looking outside the major parties for alternatives." *Campbell v. Hull*, 73 F. Supp. 2d 1081, 1091 (D. Ariz. 1999). This Court commands that in approaching candidate restrictions, "it is essential to examine in a realistic light the extent and nature of their impact on voters." *Anderson*, 460 U.S. at 786 (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)). The reality in Arizona is that since the state moved its filing deadline for independents from after to before the primary, not a single Presidential candidate has been on the ballot as an independent.[10] The provisions of A.R.S. § 16-341 make it virtually impossible for a reasonably diligent independent candidate to secure access to the Arizona ballot.

Ballot access challenges arise in the heat of elections, placing each reviewing court under tremendous time pressure. *See, e.g., Browne v. Bayless*, (Ariz. Super. Ct., Sept. 8, 2000) (complaint filed August 18, 2000); *Nader 2000 Primary Committee v. Hazeltine*, 110 F. Supp. 2d 1201, 1204 (D. S.D. 2000) ("There is great urgency in this matter" since court's decision regarding plaintiff's access to the ballot fell on deadline date for defendant to certify names to be placed on ballot); *Anderson v. Celebrezze*, 499 F. Supp. 121 (S.D. Ohio 1980) (ordering John Anderson be placed on the ballot as an independent candidate on July 17, 1980); *Anderson v. Quinn*, 495 F. Supp. 730 (D. Me. 1980) (same on August 11, 1980); *Greaves v. Mills*, 497 F. Supp. 283 (E.D. Ky. 1980) (same on August 14, 1980); *Anderson v. Hooper*, 498 F. Supp. 898

10. Although in 1980, the same year Anderson ran as an independent, five individuals were able to qualify as independent presidential candidates in Ohio, *Anderson v. Celebrezze*, 499 F. Supp. 121, 143-44 (S.D. Ohio 1980), this Court nevertheless found Ohio's March 20 filing deadline to be unconstitutionally burdensome for independent voters and candidates.

(D. N.M. 1980) (same on July 8, 1980); *Anderson v. Morris*, 500 F. Supp. 1095 (D. Md. 1980) (same on August 6, 1980), *aff'd* 636 F.2d 55 (4th Cir. Sept. 17, 1980). In so doing, they sow uncertainty in the presidential election process, casting doubt about which candidates will be on the November election ballot. This case, however, presents an opportunity for the Court to review this critical issue about the timing of independent presidential candidacies in advance of the 2004 election.

II. The Arizona Supreme Court's Ruling Conflicts with This Court's Holding in *Anderson v. Celebrezze*.

As each of the courts below has recognized, this Court addressed the precise issue presented by this case, namely, the burden placed on independent candidates and their supporters by early filing deadlines. *See Browne v. Bayless*, 46 P.3d 416, 418 (Ariz. 2002) (describing *Anderson* as a case "involving similar facts."); *Browne v. Bayless*, 25 P.3d 749, 752 (Ariz. Ct. App. 2001) ("[T]he *Anderson* facts closely mirror the facts of this case. . . ."). In *Anderson v. Celebrezze*, 460 U.S. 780 (1983), this Court struck Ohio's March 20 filing deadline for independent presidential candidates, holding that it substantially, and unjustifiably, burdened the speech and associational rights of independent voters and candidates and "implicate[d] a uniquely important national interest." *Id.* at 794-95; *see also Norman v. Reed*, 502 U.S. 279, 288-89 (1992) (noting "'the pervasive-national interest in the selection of candidates for national office, [which] . . . is greater than any interest of an individual State.'") (quoting *Cousins v. Wigoda*, 419 U.S. 477, 490 (1975)). The Arizona Supreme Court misapplied *Anderson* to become the only court since that decision to uphold a petition deadline earlier than July 15 (App. H at 54.).

John Anderson, a veteran Republican Congressman had withdrawn from the Republican primaries to pursue an independent candidacy for President. *Anderson*, 460 U.S. at 782. Ohio law required independent presidential candidates to submit the requisite number of valid petition signatures no later than seventy-five days before the state primary, scheduled for June 3, 1980. Ohio Rev. Code § 3513.25.7 (Supp. 1980). Candidates running for party nominations had until late August — five months after the independent deadline — to qualify for the ballot. *Id.* § 3505.10 (Supp. 1980). Almost two months late, on May 16, Anderson submitted nominating petitions to Ohio's Secretary of State. The petitions, which would have entitled Anderson a place on the ballot if they had been filed by March 20, 1980, were rejected as untimely. *Anderson*, 460 U.S. at 782. Anderson did not attempt to use Ohio's provision for independent "write-in" candidacies, *id.* at 799 & n.26, but rather filed suit challenging the constitutionality of Ohio's filing deadline for independent candidates, *id.* at 783.

Rejecting a "litmus paper test," *id.* at 789, this Court established a balancing test to determine the constitutionality of a challenged ballot access provision. A court must

> first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. . . . [T]he Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.

Id.

Applying that test, this Court found that Ohio's March filing deadline placed a distinctive and substantial burden on the rights of independent-minded voters because "a late emerging Presidential candidate outside the major parties, whose position on the issues could command widespread community support, is excluded from the Ohio general election ballot." *Id.* at 792. Although facially neutral, the burdens and benefits of the Ohio law were "materially different" for partisan and independent candidates. *Id.* at 799. The law advantaged major parties by allowing them "the political advantage of continued flexibility" and simultaneously disadvantaged supporters of independent candidates who "'will rarely if ever be a cohesive or identifiable group until a few months before the election.'" *Id.* (quoting *Williams v. Rhodes*, 393 U.S. 23, 33 (1968)). Gathering signatures far in advance of an election places a unique burden on an independent candidate, including voter disinterest, volunteer recruitment and coordination, publicity and fundraising. *Id.* at 792-93. Moreover, "because the interests of . . . independent candidates are not well represented in state legislatures, the risk that the First Amendment rights of those groups will be ignored in legislative decisionmaking may warrant more careful judicial scrutiny." *Id.* at 793 n.16.

On the state interest side of the balance, this Court noted that Ohio has "a less important interest in regulating Presidential elections than statewide or local elections." *Id.* at 795. The Court rejected Ohio's asserted need for seven months to educate the voters about the candidates, given modern communications and the fact that "'campaign spending and voter education occur largely during the month before an election.'" *Id.* at 797 (quoting *Dunn v. Blumstein*, 405 U.S. 330, 358 (1972)). The state's equal treatment

justification was also found to be without merit: "The name of the nominees of the Democratic and Republican Parties will appear on the Ohio ballot in November even if they did not decide to run until after Ohio's March deadline had passed, but the independent is simply denied a position on the ballot if he waits too long." *Id.* at 799. The Court also rejected Ohio's political stability justification, finding that it amounted to "a desire to protect existing political parties from competition." *Id.* at 801. Nor could the state justify its early deadline by appealing to administrative concerns. While acknowledging the necessity of a certain ordering and timing of events — for example, the primary must be set sufficiently in advance of the general election — the Court accepted the district court's finding that "[s]eventy-five days appears to be a reasonable time for processing the documents and preparing the ballot." *Id.* at 800. The Court's conclusion was unequivocal: "Under any realistic appraisal, the 'extent and nature' of the burdens Ohio has placed on the voter's freedom of choice and freedom of association, in an election of nationwide importance, unquestionably outweigh the State's minimal interest in imposing a March deadline." *Id.* at 806.

The difference between Ohio's deadline on March 20 and Arizona's deadline on June 14 does not make the burden here different in kind from the one deemed substantial and unconstitutional in *Anderson*. Whether the effective period between the deadlines for filing independent versus party candidacies in Arizona is 113 days, as the court below calculated, *see id.* at 418, or 146 days, as Browne contends,[11] the fact

11. The Arizona Supreme Court counted from the filing deadline, June 14, to the date ballots must be made available, October 5, under Arizona's early ballot law, A.R.S. § 16-545. *Browne*, 46 P.3d at 419. The court failed, however, to take into account the time

(Cont'd)

remains that independent-minded citizens must decide on an electoral strategy well before the major parties designate nominees. As the Arizona Court of Appeals recognized,

> [i]n national election campaigns, the parties' candidates and issues remain dynamic rather than static, often up to the time of the parties' conventions. The two major parties may change their strategies and even their candidates based on topical developments. However, independent candidates lack such an advantage after they are locked in by the June 14 deadline.

25 P.3d at 752. Thus the raison d'être of many independent candidacies — to respond to late-developing issues or to new information disclosed about other candidates — is undermined if not defeated by a mid-June filing deadline.[12] *Anderson*, 460 U.S. at 782.

Evaluated "in a realistic light,'" *id.* at 787, Arizona's mid-June filing deadline requires an independent candidate to decide to run, organize, and execute a significant signature-gathering

---

(Cont'd)

required to gather 10,000 valid signatures before the June 14 deadline. At significant financial cost, petitioner required at least 21 days to collect the requisite signatures. (*See* Pls.' Resp. to Questions from Def., *Browne v. Bayless*, No CV 2000-015468 at 4 (Ariz. Super. Ct. Sept. 1, 2000).)

12. Contrary to the Arizona Supreme Court's analysis, *Browne*, 46 P.3d at 419, it does not make a significant difference that the events that thrust Browne into an independent candidacy involved primarily the Libertarian Party rather than the two major parties. The key point is that Arizona's presidential ballot access scheme is not sufficiently flexible to accommodate developments in the political party nominating process.

campaign early in the election cycle. For candidates trying to run national campaigns, this is an especially serious challenge. *See id.* at 792; *Burdick v. Takushi*, 504 U.S. 428, 443 (1992) (Kennedy, J. dissenting) (finding filing deadline for independent candidates of 60 days before primary "a condition difficult for many small parties to meet" because it "requires considerable organization at an early stage in the election."). The burden is compounded because Arizona's filing deadline is earlier than and out of line with forty-eight other states. (App. I.) It stands as a trap for unwary independents who risk forfeiting a place on the ballot in Arizona if they do not divert valuable resources to signature-gathering there before the overwhelming majority of other states require them to take action. Moreover, the burden is unnecessary, for while it makes sense to set the petition deadline for primary candidates a certain number of days before the primary election, there is no rationale for tying the deadline for presidential candidates — partisan and independent — to the date of a primary in which they do not compete.

Despite the dictates of *Anderson* and other ballot access cases, the court below determined that it was "not required to subject the State's election scheme to a heightened degree of scrutiny." *Browne*, 46 P.3d at 420. It proceeded to subject the state's two justifications for the early deadline — equal treatment and administrative necessity — to minimal review. *Id.* While Arizona claims that its early filing deadline advances the state's interest in treating all candidates alike, in light of the undeniably different burdens the statute places on independent and partisan candidates, this justification has "no merit," *see Anderson*, 460 U.S. at 799 (rejecting Ohio's equal treatment argument) and "borders on the frivolous." *Anderson v. Quinn*, 495 F. Supp. 730, 733 (D. Me. 1980) (same for Maine's early filing deadline). "[T]he reasons for

requiring early filing for a primary candidate are inapplicable to independent candidates in the general election."[13] *Anderson*, 460 U.S. at 799. The inherent discrimination of the deadline cannot be disguised by its facially neutral application. "'[E]qual treatment' of partisan and independent candidates simply is not achieved by imposing the [same] filing deadline on both. As [this Court has] written, '[sometimes] the grossest discrimination can lie in treating things that are different as though they were exactly alike.'" *Id.* at 801 (quoting *Jenness v. Fortson*, 403 U.S. 431, 442 (1971)).

The main thrust of Arizona's justification for the early deadline is that the Secretary of State needs time to prepare the ballots and allow for resolution of legal challenges to petitions. Unquestionably, "there must be a substantial regulation of elections . . . if some sort of order, rather than chaos, is to accompany the democratic process," *Storer v. Brown*, 415 U.S. 724, 730 (1974), necessitating "some cut off period is necessary" for individuals to declare their candidacies, *see American Party of Texas v. White*, 415 U.S. 767, 787 n.19 (1974). However, for over eighty years when the filing deadline was in September — 100 days later than it is now — Arizona completed these election tasks in a timely manner. None of the administrative functions the Secretary of State relies on to defend the early deadline — petition challenges, absentee voting, preparing overseas ballots,

---

13. If Arizona genuinely seeks to treat independent and partisan candidates alike, it could allow an independent candidate (with properly demonstrated support) to announce his or her candidacy at the same time as the major parties — at the end of the summer, following the party conventions. This would still be an earlier deadline than the one Arizona had in place without incident from 1909 to 1993.

translating election materials — had disrupted an election prior to the dramatic shift backward of the 1993 amendment, despite the fact that they have been longstanding features of Arizona elections. *See*, *e.g.*, 40 Fed. Reg. 43746 (Sept. 23, 1975) (subjecting Arizona to Section 5 of the Voting Rights Act which requires states to translate election materials into specific languages). The Secretary of State conceded that she does not need 146 days before the November election to prepare the Arizona presidential ballots, *Browne*, 25 P.3d at 753, particularly since Arizona cannot print the ballots until the identities of the major party candidates are known, not just for the presidential candidates, but for a host of candidates for other offices determined at the September primary.[14] Indeed, counsel for the respondent admitted at oral argument before the court of appeals that "performance of these administrative duties need not commence until well after the June 14 deadline." *Id.* at 753-54.[15]

---

14. Although Arizona apparently does not have a firm deadline on which the parties inform the Secretary of State of their nominees, it is at the earliest after their conventions in the late summer, approximately two months later than the independent filing deadline. The Libertarian Party informed Arizona of its candidate on September 6, almost 3 months after the independent filing deadline.

15. As that court also explained,

> [w]hether August 17 is a reasonable deadline is not the issue before us because that election is complete, rendering injunctive relief impossible for that election. We must determine only if the statutory June 14 deadline is justified. Exactly which date would survive a constitutional challenge is not a question we need decide in this appeal.

Browne, 25 P.3d at 754 n.14. The same holds true as to the issue before this Court — petitioners ask the Court only whether a June 14 deadline is unconstitutional.

In a presidential election, where the State's interest is appreciably lower than in state and local elections, the cut off point may not be discriminatory, or determined according to mere convenience. So, for example, respondent's argument that she will not know whether space for an independent candidate's electors should be included on the ballot until administrative and judicial proceedings are completed, cannot be accorded much weight under the *Anderson* balancing test. The state's interest in avoiding blank spaces on the ballot is "trivial," *Browne*, 25 P.3d at 753, compared to the heavy and unequal burden placed on independent candidates by the early deadline, and cannot justify the regulation. *See Norman v. Reed*, 502 U.S. 279, 288-89 (1992)

> To the degree that a State would thwart [the constitutional interest of like-minded voters to gather in pursuit of common political ends] by limiting the access of new parties to the ballot, we have called for the demonstration of a corresponding interest sufficiently weighty to justify the limitation and we have accordingly required any severe restriction to be narrowly drawn to advance a state interest of compelling importance.

The *Anderson* Court, reviewing a similar electoral scheme in Ohio observed that "[s]eventy-five days appears to be a reasonable time for processing the documents submitted by candidates and preparing the ballot." 460 U.S. at 800. Manifestly, Arizona has "a less drastic way of satisfying its legitimate interests," *id.* at 806, than establishing a deadline that is almost twice the length of time recognized as adequate in *Anderson*.

This case provides an appropriate opportunity for this Court to clarify what its own prior decision in *Anderson* seems so clearly to indicate and to ensure that unnecessarily early and burdensome state filing deadlines for independent presidential candidates do not thwart voter choice by excluding independent voices from the national presidential election process. Without clear guidance from this Court, states can force independent candidates to petition onto the ballot increasingly early in the election cycle — as Arizona did here — while allowing political parties maximum flexibility to select their nominees.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

NANCY NORTHUP
Counsel of Record
KIM BARRY
BRENNAN CENTER FOR JUSTICE
AT NEW YORK UNIVERSITY SCHOOL OF LAW
Attorneys for Petitioners
161 Avenue of the Americas
12th Floor
New York, New York 10013
(212) 998-6730

APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF THE STATE OF ARIZONA FILED MAY 24, 2002

THE SUPREME COURT OF THE STATE OF ARIZONA
En Banc

Arizona Supreme Court
No. CV-01-0383-PR

Court of Appeals
Division One
No. 1 CA-CV 00-0546

Maricopa County Superior Court
No. CV 2000-015468

HARRY BROWNE; MARCENE CANDELARIA; AND PETER SCHMERL,

Plaintiffs-Appellants,

v.

BETSEY BAYLESS, Secretary of State of Arizona,

Defendant-Appellee.

OPINION

Appeal from the Superior Court in Maricopa County
The Honorable Barry C. Schneider, Judge
AFFIRMED

Appendix A

Opinion of the Court of Appeals, Division One
200 Ariz. 261, 25 P.3d 749 (App. 2001)
VACATED

ESCHER, Judge

On August 17, 2000, Betsey Bayless, the Secretary of State, refused to accept Harry Browne's designation of electors and nominating petitions to appear on the November ballot as an independent candidate for president of the United States because they were filed two months beyond the statutory deadline. Rejecting Browne's[1] claim that the filing deadline for independent candidates in A.R.S. § 16-341 violated the First Amendment, the trial court denied his request for declaratory and injunctive relief. The court of appeals reversed, holding that the statute impermissibly burdened the association rights of independent voters. *Browne v. Bayless*, 200 Ariz. 261, 25 P.3d 749 (App.2001). The court rejected the Secretary's arguments with respect to mootness, laches and standing. We agree with the court's resolution of the latter issues. However, we conclude that § 16-341 does not impose severe restrictions on Browne's First Amendment rights and furthers important regulatory interests of the State. We therefore vacate the opinion of the court of appeals and affirm the trial court's decision.

---

1. The complaint for special action, declaratory judgment and injunctive relief was filed by Browne, Marcene Candelaria (as a prospective elector committed to Browne) and Peter Schmerl (as an Arizona voter who would have voted for Browne had his name been placed on the ballot). The plaintiffs will be collectively referred to as "Browne."

Appendix A

FACTS AND PROCEDURE

Browne began his campaign for president in Arizona as a candidate of the Libertarian Party. He received 78% of the votes for Libertarian candidate in Arizona's Presidential Preference Election on February 22, 2000. On July 2, he was nominated for president at the national Libertarian Party convention. He ultimately appeared as the Libertarian presidential candidate on the ballots of 47 states and the District of Columbia.

In Arizona, however, a split developed within the state Libertarian Party, and Browne's supporters lost the battle for control of the party. The two factions submitted nomination papers for separate sets of electors to the Secretary of State by the June 14 deadline, but on June 20, Browne's electors were informed that they would not be placed on the ballot. After his nomination at the national party convention and failed negotiations with his opponents, Browne decided to campaign in Arizona as an independent candidate. He began circulating petitions to obtain the required number of signatures, and submitted his slate of electors and his nominating petition to the Secretary of State on August 17. The Secretary refused to accept the filing as untimely, and Browne filed his complaint in superior court on August 18. In a brief minute entry, the trial court denied the requested injunctive relief and dismissed the complaint.

The court of appeals found that, although Arizona's election laws appeared to impose the same filing deadline for all types of candidates, for practical purposes the deadlines were quite different and more restrictive for independent candidates than

for political party candidates. Moreover, the statutes tied the deadline for independent candidates to party primary elections even though such candidates do not participate in them. Applying the analytical framework laid out by the United States Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564 (1983), the court of appeals found that the June 14 deadline imposed a "suspect burden" on the rights of voters by treating independent candidates in a manner that was both dissimilar and more burdensome than party candidates. *Browne*, 200 Ariz. at 265, 25 P.3d at 753, ¶ 18. The court then found that the State had advanced no "substantial reasons" justifying the June 14 deadline and therefore concluded that the resulting burden on the rights of independent voters was impermissible under the First Amendment. *Id.* at 266, 25 P.3d at 754, ¶ 24.

ANALYSIS

Arizona's election laws create four different procedures by which a candidate may have his or her name placed on the general election ballot: 1) as a candidate of a "new" political party, A.R.S. §§ 16-311, 16-801, 16-803; 2) as a candidate of a previously recognized political party, *Id.* §§ 16-311, 16-804; 3) as an independent candidate, *Id.* §§ 16-311, 16-341; or 4) as a write-in candidate, *Id.* § 16-312. In all cases except write-in candidacies, candidates must file nomination papers not less than 90 days before the primary election. *Id.* § 16-311(A)-(B). In 2000, that date was June 14. Write-in candidates must file their nomination papers not less than fourteen days before the general election. *Id.* § 16-312(B).

Appendix A

In presidential contests, the nomination paper is filed not by a specific candidate, but rather by a slate of presidential electors. *Id.* §§ 16-311(E), 16-341(G). The statutes do not establish a deadline for notifying the Secretary of State of the identity of a political party's presidential candidate. The record indicates that the state party chairman customarily provides this information by letter after the parties have completed their nominating conventions in July or August. On the other hand, electors supporting an independent candidate must file a nomination petition for that candidate, signed by three percent of qualified electors not registered as members of a recognized political party, at the same time their nomination paper is filed. *Id.* § 16-341(E). The practical effect of the statutes, then, is to create a deadline for identifying independent presidential candidates one to two months earlier than that for political party candidates.

In *Anderson*, a case involving similar facts, the Supreme Court acknowledged that, in varying degrees, state election laws burden two basic First Amendment rights: "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." 460 U.S. at 787, 103 S.Ct. at 1570 (quoting *Williams v. Rhodes*, 393 U.S. 23, 30-31, 89 S.Ct. 5, 10 (1968)). The Court also recognized the State's interest in ensuring fair, orderly and honest elections, and observed that, notwithstanding the impact on the right to vote and to associate, that interest is "generally sufficient to justify reasonable, nondiscriminatory restrictions." *Id.* at 788, 103 S.Ct. at 1570.

> Constitutional challenges to specific provisions of a State's election laws therefore cannot be resolved by any "litmus-paper test" that will separate valid from invalid restrictions. Instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional. The results of this evaluation will not be automatic; as we have recognized, there is "no substitute for the hard judgments that must be made."

Id. at 789-90, 103 S.Ct. at 1570 (citations omitted).

The Ohio statute before the Court in *Anderson* imposed a March 20 filing deadline on independent candidates, 75 days before the June primary election and 229 days before the general election. Because this deadline occurred four to five months before the major political parties had identified their candidates and solidified their platforms, the Court found that it imposed an unequal burden on independent

candidates, impinged on voters' associational choices and discriminated against candidates and voters outside the existing political parties. The Court further found that, in the context of a presidential election, the deadline imposed a significant restriction on the nationwide electoral process. *Id.* at 793-95, 103 S.Ct. at 1572-73. In support of the March deadline, the State asserted its interest in allowing sufficient time for voter education, treating all candidates alike, and ensuring political stability. While acknowledging the legitimacy of these interests, the Court found them to be "minimal" in comparison to the burdens resulting from the early deadline. *Id.* at 806, 103 S.Ct. at 1579. Accordingly, the Court held the statutory deadline unconstitutional.

Although the court of appeals acknowledged the differences between the Ohio statute and Arizona's election laws, it found that those differences were not significant and did not warrant a different conclusion as to the degree of burden imposed on the rights of independent voters. We disagree, for several reasons. First, the filing deadline in Arizona is 83 days closer to the general election than the Ohio deadline in *Anderson*, a significant difference in and of itself. The period between the deadline and the election is further abbreviated by Arizona's early ballot law, A.R.S. § 16-545, which requires that ballots be available for mailing to voters who request them 33 days prior to the general election. The effective period between the filing deadline and the election is thus 113 days.

Second, the national political process has evolved toward a system of ever-earlier presidential primary elections with the result that, by the middle of June in an election year, the identities and positions of the major party candidates have

largely been determined. Thus, the concern in *Anderson* that independent voters disaffected from existing political parties would not have sufficient time to coalesce into viable groups is not present here. That concern is even less significant in this case given the nature of Browne's candidacy. Until at least June 14, he was a member of the Libertarian Party seeking nomination as that party's candidate to represent the views of that party's members. It is only because he lost the internal party dispute — and not in response to events transpiring within the major political parties — that he even sought to run as an independent candidate.

It is apparent, therefore, that Browne's exclusion from the ballot resulted not from a filing deadline that discriminated against independents but rather from his failed attempt to be nominated by his party. And nowhere does it appear that the views he espoused or the voters he purported to represent were other than those of the Libertarian Party, which were already represented by the successful slate of Libertarian electors. Thus there has been no showing that, as a result of the filing deadline, voters were deprived of either the right to associate to advance their political beliefs or the right to cast their votes effectively.[2] *See Anderson*, 460 U.S. at 787, 103 S.Ct. at 1569 ("[V]oters can assert their preferences only through candidates or parties or both."). Accordingly, we conclude that the court of appeals erred in finding that the June 14 filing deadline created a "suspect burden" on the rights of independent voters.

---

2. To the contrary, the record shows that three independent candidates appeared on the 2000 general election ballot, including one running for the office of United States Senator, notwithstanding the June 14 deadline.

We therefore examine the Secretary's justification for the deadline. The Secretary advanced a number of reasons in support of the June deadline that are largely administrative in nature. They include the need to prepare early ballots, sample ballots and ballots for overseas voters not later than 33 days before the date of the general election; the increase in ballot preparation and printing time resulting from the use of optical scan ballots, and the need for adequate time to complete administrative and judicial review of election challenges. Because the Secretary conceded at oral argument before the court of appeals that she did not need the entire 146 days between the filing deadline and the general election to complete her responsibilities, and the record did not support a finding that that period of time was necessary, the court of appeals concluded that the Secretary had not articulated substantial reasons for the burden on the rights of independent voters resulting from the deadline.

In light of our finding that the deadline does not impose a suspect or severe burden on the rights of independent voters, we are not required to subject the State's election scheme to a heightened degree of scrutiny, as the court of appeals did. *See Burdick v. Takushi*, 504 U.S. 428, 112 S.Ct. 2059 (1992). We look instead to determine whether the restrictions imposed are reasonable and nondiscriminatory. *Anderson*, 460 U.S. at 788, 103 S.Ct. at 1570. Applying this standard of review does not mean that this legislative choice can be justified only if it allows the Secretary the minimum period required for completing her duties. Rather, the deadline must be rationally related to the State's important regulatory interests. The Court in *Anderson* found that 75 days "appears to be a reasonable time for processing the documents

submitted by candidates and preparing the ballot." *Id.* at 800, 103 S.Ct. at 1576. The United States District Court for Arizona has found that Arizona's prior filing deadline of June 27 did not, by itself, constitute an impermissible burden on the rights of independent voters. *Campbell v. Hull*, 73 F.Supp.2d 1081 (D. Ariz. 1999). Since that decision, the Legislature established an earlier deadline by fifteen days, but also enacted the early voting law, with the result that the current deadline is effectively earlier than the one upheld in *Campbell*, or 113 days before the ballot must be complete.

The Secretary presented evidence that this period of time was necessary to complete election challenge proceedings and then prepare and print the final ballot. Separate ballots must be prepared for each political subdivision in the state, including not only federal and state candidates and measures but also the candidates and measures for individual counties, cities, towns, and districts. Ballot forms cannot be formatted for printing until it is known how many sets of presidential electors will be placed on the ballot. In the event of a challenge to the nominating petitions, the Secretary will not know whether space for an independent candidate's electors should be included on the ballot until the administrative and judicial proceedings are completed. Although the applicable statute contemplates that this will occur within 25 days plus time for a "prompt" decision by this court, A.R.S. § 16-351(A), we can take judicial notice of our own records to find that these cases do not always reach this court within 25 days, and that ample time for a "prompt" decision often means more than a few days. Indeed, it was precisely because the law did not allow sufficient time to complete the challenge process as a practical matter that the Legislature moved the

deadline back an additional 15 days in 1999. 1999 Ariz. Sess. Laws ch. 166, § 1. Finally, the completed ballots must be translated into numerous Native American languages in order to comply with the Voting Rights Act. 42 U.S.C. §§ 1973 *et seq*. While the Secretary may not need the entire period of time allowed under § 16-351 to complete her duties in every election year, additional time clearly is necessary when electoral challenges and related court proceedings occur. The time frame created by the Legislature is rationally related to the State's legitimate interest in ensuring an orderly resolution of those challenges before the deadline for composing, printing and distributing the final ballots.

CONCLUSION

For the foregoing reasons, we hold that the filing deadline imposed by A.R.S. § 16-341 does not impermissibly burden the association rights of independent voters. The opinion of the court of appeals is vacated and the trial court's order is affirmed. Each side will bear its own costs and attorneys' fees.

PATRICIA G. ESCHER, Judge*

---

* Due to a vacancy on the court, pursuant to article VI, § 3 of the Arizona Constitution, the Honorable Patricia G. Escher, Judge of the Superior Court in Pima County, was designated to sit on this case.

Appendix A

CONCURRING:

CHARLES E. JONES, Chief Justice

RUTH V. McGREGOR, Vice Chief Justice

STANLEY G. FELDMAN, Justice

THOMAS A. ZLAKET, Justice (retired)

APPENDIX B — OPINION OF THE COURT OF APPEALS OF ARIZONA, DIVISION ONE, DEPARTMENT B FILED MAY 29, 2001

COURT OF APPEALS OF ARIZONA, DIVISION ONE, DEPARTMENT B

No. 1 CA-CV 00-0546

HARRY BROWNE; MARCENE CANDELARIA; AND PETER SCHMERL,

Plaintiffs-Appellants,

v.

BETSEY BAYLESS, Secretary of State of Arizona,

Defendant-Appellee.

OPINION

GERBER, Judge

The appellants, Harry Browne, Marcene Candelaria and Peter Schmerl (collectively referred to as "Browne"), requested an affirmative injunction requiring the Arizona Secretary of State, Betsey Bayless ("Secretary of State"), to accept Browne's late-filed petition to appear on the November 2000 Arizona ballot as an independent candidate for President of the United States. The trial court denied Browne's injunction request and ruled in favor of the Secretary of State. Browne now appeals from the trial court's ruling. He argues that

the Arizona filing deadline for independent presidential candidates is unconstitutional because it unfairly and unnecessarily burdens independent candidates such as himself.

FACTUAL AND PROCEDURAL HISTORY

Browne was nominated for president by the Libertarian party in its national nominating convention in July 2000. However, the electors supporting his nomination were led by a person not named as the official Arizona state leader of the Libertarian party. Consequently, the Arizona Libertarian slate of electors did not name Browne as its nominee and his name did not appear on the Arizona ballot as such.

Believing that he would be his party's nominee, Browne did not submit the necessary signatures for the ballot as an independent candidate until after the June 14 statutory deadline. On August 17, 2000, two months after the June 14 deadline, he attempted to file with the Secretary of State his designation of electors and nominating petitions as an independent candidate under Arizona Revised Statutes Annotated ("A.R.S.") § 16-341 (Supp. 2000).

When the Secretary of State refused to accept Browne's designation of electors and nominating petitions, he brought a complaint against that office seeking injunctive relief and a declaratory judgment that A.R.S. § 16-341 was unconstitutional. The trial court found the statute constitutional, denied his request for injunction and dismissed his complaint. Browne timely appeals. We have jurisdiction under A.R.S. §§ 12-120.21(A)(1) (1992) and 12-2101(B) (1994). We reverse because we find the statute unconstitutional.

Appendix B

DISCUSSION

I. MOOTNESS

The Secretary of State argues that Browne's claims are moot. A case becomes moot "when an event occurs, pending an appeal, which renders the relief sought either impossible or without practical effect on the parties to the action." *Sandblom v. Corbin*, 125 Ariz. 178, 182, 608 P.2d 317, 321 (App. 1980). We may consider a moot appeal if it presents significant questions of public importance that are likely to recur. *Fisher v. Maricopa County Stadium Dist.*, 185 Ariz. 116, 119, 912 P.2d 1345, 1348 (App. 1995). The constitutionality of A.R.S. § 16-341 is of public importance and Browne's untoward experiences could well recur with other independent presidential candidates. We accordingly decide that mootness presents no reason to avoid the issues raised.

II. LACHES

The Secretary of State argues that Browne's challenge is barred by laches because he waited until August 17, 2000 to file his petitions when he knew the statutory deadline was June 14. "[Laches] is an equitable counterpart to the statute of limitations, designed to discourage dilatory conduct. [It] will generally bar a claim when the delay is unreasonable and results in prejudice to the opposing party." *Sotomayor v. Burns*, 199 Ariz. 81, ¶ 6, 13 P.3d 1198, 1199-1200 (2000).

Though Browne was nominated as the national Libertarian party candidate on July 2, 2000, he was not nominated as the Arizona party candidate on that date. In response to

his local party's non-support, on or about July 16, 2000, he decided to run in Arizona as an independent candidate. He promptly gathered signatures and filed his petition on August 17, 2000. When the Secretary of State rejected that petition, Browne filed a complaint with the superior court the next day. Given his diligence, we find that laches does not bar his action.

III. STANDING

The Secretary of State next contends that Browne lacks standing because he argues that the filing deadline is unconstitutional for independent candidates while he is affiliated with a recognized political party. She further argues that Browne's absence from the ballot was due to "intra-party squabbling" rather than his inability to timely file petition papers as an independent.

Browne was not formally endorsed by any political party in this state and therefore had to run as an independent candidate to appear on the Arizona ballot. Moreover, even a party-affiliated candidate may run as an independent. As such, Browne has standing to challenge the independent candidate filing deadline. Furthermore, one reason he did not appear on the ballot was that he missed the very filing deadline that he now asserts is unconstitutional. Given these factors, we conclude that Browne has standing to raise these issues.

IV. CONSTITUTIONALITY OF A.R.S. § 16-341

On the merits, Browne argues that A.R.S § 16-341 is unconstitutional because its June 14 deadline is unnecessarily restrictive. He also contends that the deadline treats

independent presidential candidates dissimilarly from candidates of recognized parties. He further states that the Secretary of State cannot identify any valid administrative reason for a filing deadline 146 days prior to the November general election.

Browne relies heavily on *Anderson v. Celebrezze*, 460 U.S. 780, 75 L.Ed.2d 547, 103 S.Ct. 1564 (1983), to support his arguments. In that case, Anderson, a Republican not nominated by his party, announced on April 24, 1980 that he would run as an independent candidate for president. On May 16, his supporters tendered a nominating petition and statement of candidacy to the Ohio Secretary of State, who refused to accept the documents because they were submitted after the March 20 deadline then required by the Ohio statute. *Id.* at 782-83.

The Supreme Court found the Ohio deadline unconstitutional because it burdened the association rights of independent voters and candidates and placed significant restrictions on the nationwide presidential electoral process. *Id.* at 795. The Court found that the deadline discriminated against political party candidates and voters with preferences outside the two dominant political parties. *Id.* at 794.

The Court also stated that the propriety of state election deadlines cannot be resolved by any "litmus-paper test." Instead, a balancing test is involved:

> [A] court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights

> protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Id. at 789. Because the *Anderson* facts closely mirror the facts of this case,[1] we adopt and apply its analysis to Browne's situation.

A. THE BURDEN

Under *Anderson's* analytical framework, we must first determine if Arizona's June 14 deadline burdens ballot access and, if so, the magnitude of that burden. *Id.* Not all restrictions on candidates' eligibility for the ballot constitutionally burden voters' rights to associate or to choose among candidates.

---

1. Admittedly, there are some differences between A.R.S. § 16-341 and the statute examined in *Anderson:* (1) the Ohio statute imposed a more stringent deadline for independent candidates than for recognized political party candidates; (2) the Arizona filing deadline is 146 days prior to the election compared with the Ohio deadline of 229 days; and (3) Ohio did not allow independent candidates an alternative means of access after the deadline as Arizona does (write-in candidates). However, these differences do not invalidate the *Anderson* analysis.

Id. at 788. To achieve fair elections, the state may impose comprehensive and sometimes complex election requirements. Although these regulatory schemes necessarily affect the rights of some individuals to vote, the state's regulatory interests might justify them if they are reasonable and non-discriminatory. *Id.*

The present Arizona statutory scheme requires independent candidates to declare their candidacy by filing nomination petitions on the same date that the two major parties file their slates of electors without, however, identifying their candidates. *See* A.R.S. §§ 16-311 (Supp. 2000), 16-341. This deadline is only facially equal; it actually treats differently-situated candidates alike in a way that can be grossly discriminatory. *Anderson*, 460 U.S. at 799-01. "An early filing deadline may have a substantial impact on independent-minded voters." *Id.* at 790. The slates of electors filed by the major parties need not reveal the identity of their candidate[2] nor the content of their platforms. Because the major parties need not, and indeed usually do not, pick their candidates until their late summer national conventions,[3] they

---

2. In her affidavit, the State Election Director stated that the state party chair of each major party typically sends her a letter identifying who won the nomination at the party's national convention. When these letters arrive and whether they are filed is unknown, although we note that recent presidential conventions have occurred in late July or early August, the prelude to sending these letters.

3. Arizona does have a presidential preference election early in the year. A.R.S. §§ 16-241 and 16-242 (Supp. 2000). However, the major parties are not required to participate.

have the advantage of continued strategic flexibility by comparison to independent candidates who must declare themselves candidates and file by June 14. *Id.* at 791.

In national election campaigns, the parties' candidates and issues remain dynamic rather than static, often up to the time of the parties' conventions. The two major parties may change their strategies and even their candidates based on topical developments. However, independent candidates lack such an advantage after they are locked in by the June 14 deadline. If a major party changes its platform or one major party candidate's popularity rises, an early state deadline prevents a dissatisfied independent candidate from deciding to run. *Id.* at 790. A deadline that forces independent candidates to declare earlier than major party candidates poses "a particular burden on an identifiable segment of . . . independent-minded voters." *Id.* at 792.

Arizona's June 14 deadline ties independent candidacy to the major parties' primaries even though the independent candidate does not participate in such primaries. Such a primary-based deadline affords no benefit to the independent candidate by comparison with a major party candidate who acquires organizational support precisely through primary successes. 460 U.S. at 800-01. "A burden that falls unequally on . . . independent candidates impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against the candidates and . . . those voters whose political preferences lie outside the existing political parties." *Id.* at 793-94.

Appendix B

In oral argument on appeal, counsel for the Secretary of State conceded that the June 14 deadline placed a burden on the rights of the voters. We find that the deadline does impose a suspect burden because it treats independent candidates dissimilarly from the major parties' candidates, thereby substantially impacting the rights of the voters as well.

B. THE STATE'S INTERESTS

Under *Anderson*, after determining the extent of the suspect burden, we must identify the Secretary of State's proffered interests in the existing deadline, determine their legitimacy and whether those interests justify the burden. *Id.* at 789. In a national presidential election, "a State's enforcement of more stringent ballot access requirements, including filing deadlines, has an impact beyond its own borders." *Id.* at 795. A state's reasons for requirements on a national election must exceed those for its local elections. These national election requirements cannot impose "significant state-imposed restriction[s] on a nationwide electoral process." *Id.* Given that Arizona's June 14 filing deadline impacts the national presidential election and imposes a suspect burden as described above, the state's requirements must be narrowly drawn.

At oral argument on appeal, the Secretary of State's counsel conceded that the office does not need 146 days before the November election to prepare the Arizona presidential ballots. Historically, the earliest obligation after the June 14 deadline has been formatting the ballots to allocate space for the lists of electors and ordering a sufficient quantity of ballot paper, the latter task usually performed

about July 1. However, the ballots can be formatted and an adequate amount of paper can be ordered even without knowing the exact number of independent candidates on June 14. Even if the Secretary of State or county election officials need to order more ballot paper, that task alone, given a September 17, 2000 printing deadline, does not outweigh the burden on the independent candidates to gather their signatures and file their petition papers several weeks before those administrative chores need commence. The convenience of performing these administrative tasks before they need to be done is a trivial interest compared to the heavy burden the June 14 deadline places on independent candidates.

The Secretary of State next argues that the June 14 deadline is appropriate because potential legal challenges to the petitions could consume as much as four to six weeks. Aside from such speculation, the petition process takes 25 days (excluding Saturdays, Sundays and other legal holidays) plus the time needed for the supreme court to render a "prompt" decision. *See* A.R.S. § 16-351 (Supp. 2000) (an elector may challenge the nomination of a candidate within ten days (excluding Saturday, Sunday and other legal holidays) after the last day of filing, the superior court must render a decision within ten days, which is appealable to the supreme court within five days; the supreme court must then render a decision "promptly"). This process of potential legal challenges does not justify such a deadline that comes months before the major political parties declare their candidates and consolidate their platforms.

The Secretary of State further claims that she needs time to prepare early and sample ballots and overseas ballots, as well as to translate ballots into different languages. In the past

presidential election, the deadline for mailing sample and overseas ballots was October 5, 2000. *See* A.R.S. §§ 16-542 (Supp. 2000) (request for early ballot) and 16-545 (early ballot must be delivered not later than the thirtieth day preceding the Saturday before the election). The Secretary of State also claims that the use of optical scanners in Arizona requires an unspecified amount of additional time, an argument seemingly related to ordering special scannable ballot paper.

As the Secretary of State's counsel admitted at oral argument, performance of these administrative duties need not commence until well after the June 14 deadline. Moreover, although the Secretary of State must know the major party candidates in order to print the ballots, she does not know their identities until she receives letters from the major parties after their conventions in the late summer, approximately two months after the June 14 deadline. Given these facts, the Secretary of State has not justified a filing and declaration deadline for independent candidates 146 days — almost five months — prior to the general election and some two months prior to the date for designating the two major party candidates.[4]

---

4. The Secretary of State mistakenly argues that she could not fulfill her administrative obligations given that Browne filed his petition papers on August 17. Whether August 17 is a reasonable deadline is not the issue before us because that election is complete, rendering injunctive relief impossible for that election. We must determine only if the statutory June 14 deadline is justified. Exactly which date would survive a constitutional challenge is not a question we need decide in this appeal.

Appendix B

CONCLUSION

We conclude that the June 14 deadline imposed on independent candidates by A.R.S. § 16-341 impermissibly burdens the association rights of independent voters. The Secretary of State has not articulated substantial reasons for such a burden. We therefore find that the A.R.S. § 16-341 deadline of June 14 is unconstitutional. Because Browne is the successful party on appeal, he is entitled to costs upon compliance with Rule 21, Rules of Civil Appellate Procedure. We remand to the trial court to determine Browne's trial costs pursuant to A.R.S. § 12-341 (1992).

Rudolph J. Gerber, Judge

CONCURRING:

Jefferson L. Lankford, Presiding Judge

James B. Sult, Judge

APPENDIX C — MINUTE ENTRY OF THE SUPERIOR COURT OF ARIZONA FOR MARICOPA COUNTY DATED SEPTEMBER 8, 2000

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

HONORABLE BARRY C. SCHNEIDER

CV2000-015468

CLERK OF THE COURT
FORM V000

W. Echols
Deputy

FILED: _____
CHRISTOPHER J RABOIN #012325
716-0094

ATTORNEY GENERAL
BY: JOSEPH A KANEFIELD
542-8308

HARRY BROWNE, ET AL

v.

BETSEY BAYLESS, SECRETARY OF STATE OF ARIZONA

MINUTE ENTRY

Appendix C

Plaintiffs' Verified Complaint (seeking Special Action, declaratory judgment, and injunctive relief) and "Application for Temporary Restraining Order With Notice and Application for Order to Show Cause Why a Preliminary Injunction Should Not Issue" were filed on August 18, 2000. On that date, an Order to Show Cause was issued returnable on August 28, 2000. A briefing schedule was then established and oral argument was held on September 6, 2000.

Plaintiffs seek to declare unconstitutional Arizona Revised Statute § 16-341 which requires independent candidates to file nominating petitions by June 14, 2000, 146 days prior to the general election. Plaintiffs, relying primarily on *Anderson vs. Celebrezze*, 460 U.S. 780 (1983), argue that such an early deadline places an unnecessary and unfair burden on independents' attempts to secure a position on the ballot. In *Anderson*, the United States Supreme Court stated the test for determining the constitutionality of ballot deadlines as follows:

> [Courts] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule.

460 U.S. at 789.

Prior to articulating this test, the Court expressly recognized that "reasonable, nondiscriminatory restrictions" generally can be justified by "the State's important regulatory interests."

Id. at 788. However, if a filing deadline inflicts a "severe" burden, it must be "narrowly drawn to advance a State interest of compelling importance." *Norman vs. Reed*, 502 U.S. 279, 289 (1992).

In *Wood vs. Meadows*, 207 F.3d 708 (4th Cir. 2000) a deadline for independents of the second Tuesday in June in Virginia, was found to be reasonable and not discriminatory, thereby not requiring a strict scrutiny analysis. Similarly, in the *The Council of Alternative Political Parties vs. Hooks*, 179 F.3d 64 (3rd Cir. 1999) a deadline of the first Tuesday after the first Monday in June was held to be "minimal". *Id.* at 74.

In *Campbell vs. Hull*, 73 F.Supp.2d 1081 (D. AZ. 1999), Senior District Judge Browning, in interpreting an earlier version of the statute which required a deadline of June 27, stated the following:

> Although the June 27 deadline is the third or fourth earliest in the nation, the date in and of itself may not severely burden candidates of non-qualified parties.

737 F.Supp.2d at 1089.

This court agrees with the above pronouncements and finds that the June 14 deadline is not a severe burden. Consequently, there need only be a showing of a rational basis on the part of the State to sustain the statute's constitutionality.

Appendix C

In argument, State's counsel set forth 7 reasons to justify a finding that a rational basis exists for the statute. Included among the reasons asserted were the concerns caused by:

> (1) the greater and more widespread use of early balloting; and
>
> (2) the substantial administrative burden imposed upon election officials and the courts in carrying out the challenge process.

These concerns are ameliorated by an earlier deadline. The court finds that the State has sustained its burden of demonstrating a rational basis.

The court declines to consider the remainder of the arguments put forth by the State as to laches and standing.

Based on the foregoing, the court holds that A.R.S. § 16-341 is constitutional. Accordingly,

IT IS ORDERED DENYING the request for injunctive relief.

IT IS FURTHER ORDERED dismissing the Plaintiffs' Complaint.

APPENDIX D — STATUTORY PROVISIONS INVOLVED

ARIZONA REVISED STATUTES

TITLE 16. ELECTIONS AND ELECTORS CHAPTER 3. NOMINATING PROCEDURES ARTICLE 2. FILING AND FORMS

A.R.S. § 16-311 (2001)

§ 16-311. Nomination papers; filing; definitions

A. Any person desiring to become a candidate at a primary election for a political party and to have the person's name printed on the official ballot shall be a qualified elector of such party and shall, not less than ninety nor more than one hundred twenty days before the primary election, sign and cause to be filed a nomination paper giving the person's actual address or description of place of residence and post office address, naming the party of which the person desires to become a candidate, stating the office and district or precinct, if any, for which the person offers the person's candidacy, stating the exact manner in which the person desires to have the person's name printed on the official ballot pursuant to Subsection G, and giving the date of the primary election and, if nominated, the date of the general election at which the person desires to become a candidate. A candidate for public office shall be a

qualified elector at the time of filing and shall reside in the county, district or precinct which the person proposes to represent.

* * *

E. The nomination paper of a candidate for the office of United States senator or representative in Congress, for the office of presidential elector or for a state office, including a member of the legislature, or for any other office for which the electors of the entire state or a subdivision of the state greater than a county are entitled to vote, shall be filed with the secretary of state no later than 5:00 p.m. On the last date for filing.

* * * *

Appendix D

A.R.S. § 16-341 (2001)

§ 16-341. Nomination petition; method and time of filing; form; qualifications and number of petitioners required

A. Any qualified elector who is not a registered member of a political party that is recognized pursuant to this title may be nominated as a candidate for public office otherwise than by primary election or by party committee pursuant to this section.

B. The provisions of this article shall not be used to place on the general election ballot the name of a political party which fails to meet the qualifications specified in § 16-802 or 16-804, or the name of any candidate representing such party or the name of a candidate who has filed a nomination petition in the immediately preceding primary election and has failed to qualify as the result of an insufficient number of valid signatures.

C. A nomination petition stating the name of the office to be filled, the name and residence of the candidate and other information required by this section shall be filed at the same time and with the same officer with whom primary nomination papers and petitions are required to be filed as prescribed in § 16-311. The petition shall be signed only by voters who have not signed the nomination petitions of a candidate for the office to be voted for at that primary election.

* * *

Appendix D

E. The nomination petition shall conform as nearly as possible to the provisions relating to nomination petitions of candidates to be voted for at primary elections and shall be signed by at least three per cent of the qualified electors of the state, county, subdivision or district for which the candidate is nominated who are not members of a political party that is qualified to be represented by an official party ballot at the next ensuing primary election and accorded representation on the general election ballot.

F. The percentage of qualified electors necessary to sign the nomination petition shall be determined by the total number of registered voters from other than political parties that are qualified to be represented by an official party ballot at the next ensuing primary election and accorded representation on the general election ballot in the state, county, subdivision or district at the last general election.

G. For the purposes of this section, a nomination petition for the office of presidential elector shall include a group of names of candidates equal to the number of United States senators and representatives in congress from this state instead of separate nomination petitions for each candidate for the office of presidential elector. A valid signature on a petition containing a group of presidential electors candidates is counted as a signature for the nomination of each of the

candidates. The presidential candidate whom the candidates for presidential elector will represent shall designate in writing to the secretary of state the names of the candidates who will represent the presidential candidate before any signatures for the candidate can be accepted for filing.

H. A person who files a nomination paper pursuant to this section for the office of president of the United States shall designate in writing to the secretary of state at the time of filing the name of the candidate's vice-presidential running mate, the names of the presidential electors who will represent that candidate and a statement signed by the vice-presidential running mate and the designated presidential electors that indicates their consent to be designated. A nomination paper for each presidential elector designated shall be filed with the candidate's nomination paper. The number of presidential electors shall equal the number of United States senators and representatives in congress from this state.

I. A candidate who does not file a timely nomination petition that complies with this section is not eligible to have the candidate's name printed on the official ballot for that office. The filing officer shall not accept the nomination paper of a candidate for state or local office unless it is accompanied by all of the following:

Appendix D

1. The nomination petition required by this title.

2. A political committee statement of organization or the five hundred dollar threshold exemption statement.

3. The financial disclosure statement as prescribed for candidates for that office.

APPENDIX E — LETTER FROM THE STATE ELECTION DIRECTOR TO PETER G. SCHMERL DATED JUNE 20, 2000

OFFICE OF THE SECRETARY OF STATE

June 20, 2000

Mr. Peter G. Schmerl
Chairman, Arizona Libertarian Party, Inc.
2343 East Broadway, Suite 116
Tucson, AZ 85719

VIA FACSIMILE: 520-648-3868

RE: Presidential Electors for Libertarian Party

Dear Mr. Schmerl:

As you know, two groups claiming to represent the Libertarian Party in Arizona have submitted two separate filings purporting to be the designation of Presidential Electors by the state chair of the Arizona Libertarian Party and the nomination papers for eight candidates for Presidential Elector.

We received nomination papers of eight candidates for Presidential Elector from Elizabeth A. Brandenburg-Andreasen, Chair, Arizona Libertarian Party, on May 17, 2000 and her letter designating the eight individuals on June 12, 2000. On June 14, 2000, we received your letter, signed in your capacity as Chairman, Arizona Libertarian Party, Inc., designating eight individuals to serve as Presidential Electors accompanied by their nomination papers.

Appendix E

We have consulted with the Attorney General's Office to determine which group of Presidential Electors we should formally accept and certify for placement on the ballot at the 2000 General Election. The Attorney General's Office has advised us to accept the filing of Elizabeth A. Brandenburg-Andreasen, Chair, Arizona Libertarian Party, and to place the names of the candidates for Presidential Elector submitted by her on the 2000 General Election Ballot.

Consequently, we decline to certify for the ballot the names submitted in your capacity as the Chairman of the Arizona Libertarian Party, Inc.

If you would like to discuss this with me, please feel free to call.

Very truly yours,

s/ Jessica Funkhouser
Jessica Funkhouser
State Election Director

APPENDIX F — AFFIDAVIT OF STATE ELECTION DIRECTOR, J.G. FUNKHOUSER, DATED AUGUST 31, 2000

AFFIDAVIT

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

JESSICA GIFFORD FUNKHOUSER, upon her oath, states the following to be true:

1. I am currently employed by Secretary of State Betsey Bayless as the State Election Director, and have served in this position since October 1997.

2. I am also an authorized lobbyist for Secretary Bayless for purposes of supporting or opposing legislation before the Arizona State Legislature.

3. I have been an active member of the State Bar of Arizona since October 1978 and have been involved with election law issues since 1985, including handling the following cases: *Hancock v. McCarroll*, 188 Ariz. 492, 937 P.2d 682 (Ariz. App. 1996) (citizen of stadium district does not have constitutional right of initiative); *Mecham Recall Committee, Inc. v. Corbin*, 155 Ariz. 203, 745 P.2d 950 (Ariz. 1987) (recall committee did not have to file campaign finance reports); *Londen v. Shumway*, 158 Ariz. 255, 762 P.2d 542 (Ariz. 1988) (person appointed to fill vacancy in office of governor did not have to run for remainder of the term at the next general election); *Green v. Osborne* 157 Ariz. 363, 758 P.2d 138 (Ariz. 1988) (cancellation of recall election did not deny candidates due process or equal protection);

4. I served as Assistant Chief Counsel in the Division of County Counsel of the Maricopa County Attorney's office from August 1993 to October 1997, during which I was an authorized lobbyist for the Maricopa County Attorney's office and the assigned attorney for the Maricopa County Recorder's Elections Division.

PRESIDENTIAL ELECTOR CANDIDATES — A.R.S. § 16-341

5. A.R.S. § 16-341 provides that candidates for public office, including presidential electors, may be nominated other than by primary election by filing a petition.

6. The number of signatures required for the presidential electors' petitions is at least 3% of the qualified electors in Arizona who were not registered with a recognized political party at the time of the last general election. A.R.S. § 16-341(F).

7. For the year 2000, the number of signatures required is 9,598.

8. In 1998 and previously, a "16-341 candidate" was required to obtain signatures only from registered voters who were not members of "recognized" political parties, i.e. parties that are qualified to be represented by an official party ballot at the next ensuing primary election.

9. For the 2000 elections, "16-341 candidates" were permitted to obtain signatures from registered voters of any recognized political party as well as those registered voters who were not affiliated with a recognized political party.

Appendix F

The Secretary of State permitted these signatures based upon advice of the Attorney General's office after the ruling of the U.S. District Court for the District of Arizona in *Campbell v. Hull*, 73 F.Supp.2d 1081 (D. Ariz. 1999).

10. On behalf of the Arizona Secretary of State, and as her authorized lobbyist, I sought and supported amendments to A.R.S. § 16-341 during the 2nd Regular Session of the 44th Arizona Legislature that eliminated the requirement that candidates seeking ballot access pursuant to A.R.S. § 16-341 could obtain signatures only from voters who were not members of any recognized political party. (Laws 2000, Ch. 249, 2nd Reg. Sess.; signed by the Governor of the State of Arizona, April 11, 2000).

11. In 1998, "16-341 candidates" for presidential elector were required to obtain 8,865 signatures of registered voters from the group of **306,994** registered voters who were not members of a recognized political party (*i.e.* **13.82%** of the registered voters in the state of Arizona).

12. In 2000, "16-341 candidates" for presidential elector were required to file 9,598 signatures from a group of **2,045,835** registered voters (*i.e.* 100% of the registered voters in Arizona).

13. In Arizona, all 8 candidates for presidential elector appear on the same petition sheet; therefore the signature of one voter is a signature for all 8 presidential electors pledged to a candidate for President of the United States.

14. Arizona law does not specify an outer time limit for candidates to commence petition signature gathering efforts.

15. Arizona law does not require that "16-341 candidates" for presidential elector obtain a minimum number of signatures from at least three counties, which is a requirement for partisan statewide candidates. *(See A.R.S.* § 16-322(A)(1).)

16. Candidates for presidential elector may also run for office by filing write-in candidacy documents not less than 14 days before the general election, which is October 24, 2000, for the 2000 general election.

CANDIDATES THAT HAVE GAINED BALLOT ACCESS PURSUANT TO A.R.S. § 16-341

17. In 1994, no federal, statewide or legislative candidates gained access to the general election ballot pursuant to A.R.S. § 16-341.

18. In 1996, two candidates for the state legislature gained access to the general election ballot pursuant to A.R.S. § 16-341.

19. In 1998, one candidate for U.S. Representative in Congress, District 4, gained access to the ballot pursuant to A.R.S. § 16-341.

20. In 2000, one statewide candidate for U.S. Senator and two candidates for the state legislature gained access to the ballot pursuant to A.R.S. § 16-341.

Appendix F

ELECTION TASKS AFFECTED BY A.R.S. § 16-341

21. All candidates for presidential elector, whether representing the candidate for President of a recognized political party or filing pursuant to A.R.S. § 16-341, must file the required documents with the Secretary of State at the same time.

22. In the year 2000, the deadline for filing the documents for candidates for presidential elector was June 14, 2000.

23. This deadline is necessary in light of the totality of the other election deadlines and tasks, as well as the interdependent responsibilities of the Secretary of State and the 15 county recorders and officers in charge of elections.

24. American citizens who are overseas for military or other reasons must be given the opportunity to vote in the primary and general elections. Arizona law requires the Secretary of State to certify the candidates for military and overseas voters. The Secretary of State produces paper ballots listing the candidates. A different set of ballots is produced for each of the 15 counties in Arizona and mailed to each county.

25. The Federal Voting Assistance Program (part of the Department of Defense) strongly urges the counties to have ballots in the mail for these voters no later than 45 days before the election.

26. Arizona residents may choose to vote early beginning 33 days before the election. A.R.S. § 16-542. In 2000, early voting begins on October 5, 2000.

Appendix F

27. Sample ballots must be printed no later than 40 days before the election. A.R.S. § 16-461(B).

28. Arizona is a state that is subject to the Pre-clearance ("Section 5") and Minority Language Materials and Assistance provisions under the voting rights Act of 1965, as amended. 42 U.S.C. § 1973 *et seq.* ("Voting Rights Act").

29. To comply with the Voting Rights Act, all 15 county officers in charge of election and the Secretary of State must translate election-related materials, including ballots, sample ballots and the general election publicity pamphlet, into specific minority languages including numerous Native American languages. Oral tape recordings in the Navajo language is also required.

30. Most of the voters in Arizona now vote on optical scan ballots rather than punch card ballots. Maricopa, Pima, Yavapai, Apache and Graham counties have converted from punch card voting to optical scan voting.

31. An optical scan ballot is printed on a special type of high-quality "virgin" paper to ensure that no blemishes or marks falsely record as a vote not intended by a voter.

32. Candidates for office, judges standing for retention and ballot measures are printed on both sides of an optical scan ballot. (See attachment A.)

33. The county officers in charge of elections start planning the layout of the general election ballot as soon as the June filing deadline has passed. The first office that

appears on the general election ballot, in years in which the President of the United States is elected, are the sets of presidential electors. (See attachment A.)

34. The county officer, in charge of elections also contracts with cities, towns, school districts, fire districts and other political subdivisions of the state to include their measures and candidates on the general election ballot.

35. Under Arizona law, political subdivisions of the state must hold their elections on only four consolidated election dates in March, May, September (the primary election) or November (the general election). A.R.S. § 16-204.

36. The county officers in charge of elections must know how many "sets" of presidential electors will appear on the ballot in order to determine whether one optical scan ballot page will be sufficient to contain all of the state and county offices and the candidates or measures cities, towns, school districts and other districts under contract to the county will require the county to place on the ballot.

37. The county officers in charge of elections must know in the summer before the general election whether they will need to provide 2 sheets of paper to voters in some precincts in order to order sufficient quantities of the special optical scan stock in time to print the general election ballot.

38. Maricopa County, for example, is under contract to 73 political subdivisions of the state to include their local matters on the 2000 general election ballot. (See Attachment B.)

39. Because of the length of the contents of the ballot for 35 precincts in Maricopa County, the officer in charge of elections has ordered ballot stock to print the ballot on two sheets for the ballot in those precincts. The additional stock was ordered on July 1, 2000, after reviewing June 14, 2000 candidate filings, including presidential electors.

PETITION CHALLENGES

40. Arizona law provides that any elector may bring an action in Superior Court to challenge the qualifications of a candidate for office and the validity of the signatures on his or her petition, seeking an injunction to keep the candidate's name from appearing on the ballot. A.R.S. § 16-351.

41. An elector must bring the challenge within 10 days, excluding Saturdays, Sundays and holidays, from the last day for filing the nomination petitions. A.R.S. § 16-351(A).

42. The Superior Court has 10 calendar days to hear and decide a nomination petition challenge. A.R.S. § 16-351(A).

43. A party may appeal the ruling of the Superior Court within 5 calendar days and the Arizona Supreme Court must hear and decide an appeal "promptly". A.R.S. § 16-351(A).

44. As an authorized lobbyist for the Secretary of State, I supported a recent amendment to the Arizona Revised Statutes, that increased the time for challenging a candidate's nomination petition from 5 days to 10 days from the last day for filing The amendment also provides that a challenger

now must identify each signature challenged and the basis for the challenge in the complaint or the complaint must be dismissed by the court.

45. I served as a deputy county attorney representing the Maricopa County Recorder's Office (Elections Division) in cases filed before this change in the law. In several of these challenges, after candidates had retained counsel to defend them, the plaintiffs later disclosed that they had not identified a sufficient number of allegedly invalid signatures to disqualify the candidates.

46. The requirement that all challenged signatures be identified in the complaint is designed to deter the filing of petition challenges that are not supported by a sufficient investigation of the facts. The additional 5 days for filing the action was designed to allow a reasonable amount of time for a complete investigation of the allegedly invalid signatures.

47. The nomination petition filing deadline for candidates was moved back (earlier) in order to allow for this time for investigation prior to filing a petition challenge and to allow court actions to be heard and decided in time for the county officers in charge of elections to print the ballots.

48. Maricopa County plans to start printing the candidate side of the general election ballots on September 17, 2000; Pima County will begin printing on September 19, 2000; and the other counties will begin printing on September 18, 2000. The ballot formats have been "set up", awaiting only

insertion of the names of candidates who win their primaries on September 12, 2000. Six areas for presidential electors from the six recognized political parties that filed presidential electors paperwork on or before June 14, 2000 have been provided for in the ballot set-ups.

49. If the time for filing petitions for 16-341 presidential electors was moved to August 17 (the date the plaintiff attempted to file his petitions and presidential electors' papers), the time for filing challenges to the petitions would be August 31, 2000.

50. The Superior Court would have to hear and decide the cases by September 8, 2000 (unless more time was required by the court). The deadline for filing an appeal would be September 13, 2000.

51. The Arizona Supreme Court would have a reasonable amount of time to promptly decide the appeal, and could reasonably be expected to set a briefing schedule and hear and decide the case within approximately two weeks.

52. If the Arizona Supreme Court process took only two weeks, the case would not be decided until September 27, 2000.

53. If a court challenge to the nomination petitions of presidential electors was not decided before September 17, 2000, the printing of every ballot in the state would be held up until the Arizona Supreme Court decided the case.

54. Waiting until September 27, 2000 for a decision on whether presidential electors will appear on the ballot would make it certain that ballots could not be ready for military and overseas voters on September 23, 2000 (45 days before the election), sample ballots could not be printed by September 28, 2000 (40 days before the election), and Early ballots would not be printed in time for Early Voting to begin on October 5, 2000 (33 days before the election).

CONTACTS WITH REPRESENTATIVES OF NATIONAL PARTIES

55. I received numerous telephone calls throughout the year from representatives of national parties and individual candidates for President of the United States asking about "qualifying for the ballot" in Arizona.

56. I consistently told parties and campaigns that the deadline for filing the documents for presidential electors was June 14, 2000.

57. Frequently, candidates and political parties were concerned that the national conventions for their parties were not until after the deadline for filing the presidential electors' documents. I informed them that as long as we had the paperwork for the presidential electors by the statutory filing deadline, we could accept the name of the presidential candidate from the state party chair after the national conventions.

58. I informed individuals that, historically, the state party chair will send us a letter and attach a certificate from

the national party identifying the candidate who won the nomination at the national convention. I indicated that this would be sufficient for our purposes.

59. In my conversations with all parties, including representatives of the Libertarian Party, my assumption was that the name of the candidate for President of the United States submitted by the state party chair would be the person who won the national convention regardless of which faction ultimately was recognized as authorized to designate the presidential electors.

60. In June 2000, the Arizona Secretary of State's Office received two separate filings of designation of presidential electors from two different individuals purporting to be the state chair of the Libertarian Party in Arizona.

61. On June 20, 2000, on advice of the Attorney General's office, I sent a letter via facsimile and first class mail to the two purported Arizona state chairs of the Libertarian Party informing them of the set of presidential electors we would accept for placement on the ballot. (Attachment C.)

s/ Jessica Gifford Funkhouser
JESSICA GIFFORD FUNKHOUSER

SUBSCRIBED AND SWORN TO before me this 31st day of August 2000.

s/ Sandra D. Claiborne
NOTARY PUBLIC

APPENDIX G — AFFIDAVIT OF JOSEPH W. DEHN III DATED AUGUST 35, 2000

AFFIDAVIT OF JOSEPH W. DEHN III

Concerning Placement of the Nominee of the Libertarian Party's National Convention on the General Election Ballot in Arizona

1. I am over 18 years of age, a resident of the State of California, and a member of the Libertarian National Committee.

2. On or about 9 February 2000, I had multiple telephone conversations with Jessica Funkhouser, Elections Director of the State of Arizona, for the purpose of determining the policy of the Secretary of State of Arizona with regard to the placement of the name of a party's presidential candidate on the general election ballot.

3. During these conversations and prior to Ms. Funkhouser providing an answer to my question, we discussed the factual situation including the following points: that there were two Libertarian factions in Arizona that could potentially disagree about the name to appear on the ballot; that the Libertarian Party had an upcoming national convention at which it would be nominating a candidate for president and a candidate for vice president; and that while ARS 16-344 specifies who names the presidential elector candidates for an established party, neither that section nor any other portion of the election statutes specifies who provides the name of the presidential candidate himself.

4. Ms. Funkhouser indicated to me that in the interval between our conversations she had taken steps to research this question by consultation with other staff in the Secretary of State's office.

5. In our final conversation, Ms. Funkhouser stated to me that it was the policy of the Arizona Secretary of State to place on the ballot the name of the presidential candidate nominated at the Libertarian Party's national convention.

I declare under penalty of perjury that the foregoing is true and correct.

s/ Joseph W. Dehn III
Joseph W. Dehn III

State of California SS.
County of Santa Clara

On 25 August 2000, Joseph W. Dehn III personally came before me and, being duly worn, did state that he is the person described in the above document and that he signed the above document in my presence and verified that the information contained therein is true and correct.

s/ Jonathan D. Sunshine
Notary Public

APPENDIX H — AFFIDAVIT OF RICHARD WINGER DATED AUGUST 17, 2000

Affidavit of Richard Winger

I, Richard Winger, under penalty of perjury, state:

1. I am over 18 years of age, am a resident of the State of California and reside at 3201 Baker Street, San Francisco, CA 94123. I make this declaration based on my own personal knowledge and the research that I have conducted.

2. I graduated from the University of California at Berkeley in 1966 with a BA degree in political science. Since 1985 I have been the publisher of *Ballot Access News*, a non-partisan newsletter that reports on developments in ballot access law, and developments in the law which affect political parties.

3. I have researched the ballot access laws of all 50 states from the year 1888 to the present. I have become well versed in how the ballot access laws of each state have worked historically and how those laws compare to the laws of Arizona.

4. My articles about ballot access have been published as chapters three books: 1) *Multiparty Politics in America*, edited by Paul S. Herrnson (1997: Rowman & Littlefield, Lanham, Md); *The Encyclopedia of Third Parties in America*, edited by Immanuel Ness and James Ciment (2000: M.E. Sharpe, Inc., Armonk, N.Y.); 3) *The New Populist Reader*, edited by Karl Trautman (1997: Praeger, Westport, Ct.)

5. Other articles of mine have been published in the *Wall Street Journal, Cleveland State Law Review, American Review of Politics, Oklahoma Politics, Chronicles* Magazine, *The Long Term View, Price Costco Connection*, and *California Journal*. I have appeared in discussions on ballot access on national broadcasts of NBC, ABC, CNN, National Public Radio, and Pacifica Radio.

6. I have testified in ballot access lawsuits in person in Alaska, Arkansas, Florida, Oklahoma, Oregon, Pennsylvania, Texas and West Virginia and by affidavit in Arizona, California, Colorado, Delaware, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Nevada, New Jersey, New York, North Carolina, Ohio, South Dakota, Virginia, Washington and Wyoming. I have been qualified as an expert witness in the areas of ballot access by federal courts in California, Arkansas, Oklahoma, and West Virginia. The cases were *Citizens to Establish a Reform Party in Arkansas v. Priest*, 970 F.Supp. 690 (E.D. Ar. 1996), *California Democratic Party v. Jones*, 919 F.Supp. 1397 (E.D. Ca. 1996), *Fishbeck v. Hechler*, 85 F.3d. 162 (4th Cir. 1996) and *Atherton v. Ward*, 22 F.Supp.2d 1265 (W.D. OK. 1998).

History of Arizona's Petition Deadlines for Independent Candidates

7. The original government-printed ballot law was passed by the Arizona Territorial legislature in 1891. It provided that independent candidate petitions were due 20 days before the general election. In 1909 this deadline was

moved to 10 days after the primary election (the same legislation established a primary election for the first time, to be held in mid-September, just as it is today).

In 1993 the independent candidate deadline was moved to 75 days before the primary election (which meant a deadline of late June). Last year the legislature moved the independent candidate to 90 days before the primary election (which means a deadline of mid-June).

8. The independent candidate petition deadline in Arizona had been in October or September for 102 years, when it moved to June in 1993. The reference for these law changes is: 1891: Ch. 64, p. 83; 1909: Ch. 24, p. 65; 1993: Ch. 98 § 24, p. 307; 1999: Ch. 224, sec. 1

How Arizona's Deadline Compares with the Deadlines of Other States

9. Arizona has the second-earliest petition deadline for ballot access procedures involving minor party or independent presidential candidate procedures, when the later method of ballot access for these candidates is compared. See Appendix A. "2000 Deadlines for Independent or New Party Presidential Candidates." In most states, the petition deadlines for new party presidential candidates, and independent presidential candidates, are the same. In states in which the deadlines differ, the chart in Appendix A cites the later of the two deadlines.

10. Ever since the U.S. Supreme Court opinion in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), no court has upheld any petition deadline earlier that July 15, if the case involved a presidential candidate using a procedure listed in Appendix A. In 1984, April petition deadlines in New Jersey and Utah were overturned, and May petition deadlines in Massachusetts and Pennsylvania were overturned (Massachusetts and New Jersey then changed their deadlines to late July; Pennsylvania signed a consent order setting its deadline in August; and Utah moved its independent presidential deadline to September). In 1988 Kansas did not contest a lawsuit which argued that its June independent candidate petition deadline was unconsti-tutional; the state signed a consent decree and moved its deadline to August. In 1992, a federal court granted an injunction against Nevada's June independent candidate deadline; the state then changed it to July.

11. Twenty-one states have made the petition deadlines for the independent presidential candidates later than the petition deadlines for independent candidates for non-presidential offices. These states are Alabama, Alaska, Arkansas, Hawaii, Illinois, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Montana, New Jersey, New Mexico, Ohio, Oklahoma, Rhode Island, Tennessee, Utah, Virginia, West Virginia and Wisconsin.

12. For the 2000 presidential election, the only state with an earlier independent candidate petition deadline is Texas (see Appendix A). The U.S. Taxpayers' Party challenged that deadline in 1996. However, before that lawsuit was

finally adjudicated, the state determined that the U.S. Taxpayers Party had sufficient signatures by the legal deadline (a reversal of the state's original position), and the party's lawsuit was mooted.

I declare under penalty of perjury that the foregoing is true and correct.

s/ Richard Winger

August 17, 2000 Richard Winger

APPENDIX I — SUPPLEMENTAL AFFIDAVIT OF RICHARD WINGER DATED SEPTEMBER 5, 2000

Supplemental Affidavit of Richard Winger

I, Richard Winger, under penalty of perjury, state:

1. This affidavit of supplemental to my first Affidavit in this case.

2. Four times in the 20th century, the presidential candidate who placed second or third in November, had not even declared his candidacy for president by June 14, and furthermore the party that was to nominate him did not yet exist as of June 14.

a. In 1912, Theodore Roosevelt was defeated for the Republican Party presidential nomination on June 21. He then left the Republican Party and organized a new party, the Progressive Party, nicknamed the Bull Moose Party, which nominated him at its convention on August 5. Roosevelt appeared on the ballot in 47 of the 48 states, all but Oklahoma. He placed second, ahead of the Republican nominee, President William Howard Taft. See the article on pages 437-453 of *The Encyclopedia of Third Parties in America*, volume 2 (Sharpe Reference, Armonk, N.Y., 2000).

b. In 1924, U.S. Senator Robert La Follette stated on June 15 that he would not run for president as a third party candidate if the Democrats nominated a Progressive, such as William G. McAdoo or Charles Bryan. See the *New York Times* of June 16, page 1, column 7. The Democratic national convention opened on June 24 but the party couldn't

agree on a presidential candidate until July 9 (103 ballots were taken). On July 4, Senator La Follette, having given up hope that the Democrats would nominate a progressive Democrat, declared that he would run as an independent presidential candidate with the label "Progressive"; however he also stated he was not actually organizing a new party. See the *New York Times* of July 5, page one, column one. La Follette appeared on the ballot in 47 of the 48 states, all but Louisiana. He placed third, polling 17% and carrying Wisconsin.

c. In 1936, Congressman William Lemke, a Republican from North Dakota, was nominated for president by the Nation Union for Social Justice on August 13. The National Union for Social Justice, founded by Father Charles Coughlin, had previous existence as a pressure group, but it had not been a political party until that convention. The convention that nominated Lemke also created the Union Party, and Lemke was its presidential candidate. He placed third, polling almost 900,000 votes. See the article "Union Party" on pages 564-568 of *The Encyclopedia of Third Parties in America*, volume 3 (Sharpe Reference, Armonk, N.Y., 2000).

d. In 1948, South Carolina Governor Strom Thurmond was nominated for president by the newly-created States Rights Democratic Party on July 17. The Thurmond candidacy, and the new party, were only created when the Democratic Party, at its national convention July 12-14, put a strong civil rights plank in the platform. Thurmond got on the ballot in all the southern states; he didn't particularly

care about getting on the ballot in the remainder of the country. See the article "States Rights Democratic Party" on pages 552-558 of *The Encyclopedia of Third Parties in America*, volume 3 (Sharpe Reference, Armonk, N.Y., 2000).

3. The Republican Party was not founded until July 6, 1854. See the article "Republican Party" in any version of the Encyclopedia Britannica. It went on to win a plurality in the U.S. House of Representatives in the autumn 1854 elections.

September 5, 2000 s/ Richard Winger

2000 DEADLINES FOR INDP. OR NEW PARTY PRESIDENTIAL CANDIDATE

State	2000 Deadline	Election Code Citation	Formula for Determining Date
Ala	August 31	17-19-2	date named in law
Alas	August 8	15.30.025	90 days before general election
Az	June 15	16-341.C	90 days before primary election
Ark	August 1	7-8-302(5)	date named in law
Cal	August 10	Election code 6864	88 days before general election
Colo	July 10	1-4-303	120 days before general election
Ct	August 11	9-405 & 9-453i	32 days before primary election
Del	August 19	Title 15, sec. 3001	21 days before primary election
Fla	September 1	103.021(4)	date named in law
Ga	July 11	21-2-132	secondTuesday in July
Hi	September 7	11-113	60 days before general election
Id	August 31	34-501(c)(D)	date named in law
Il	June 26	10 ILCS 5/10-6	134 days before general election
In	~~July 15~~	3-8-6-10	date named in law
Io	August 17	44.4	81 days before general election
Kan	July 31	25-305	day before primary day
Ky	August 30	118.365(7)	68 days before general election
La	September 5	1255	first Tuesday in September
Me	August 8	Tit. 21A, §354.8	date named in law
Md	August 7	Art. 33, §703(f)	first Monday in August
Ma	July 31	Ch. 53, sec. 7,10	14 weeks before general election
Mi	July 19	168.685	110 days before general election
Mn	September 12	204B.09	on primary day
Ms	September 7	23-15-785(2)	60 days before general election
Mo	July 31	115.329	last Monday in July
Mt	August 1	13-10-504	97 days before general election
Neb	August 28	32-504(1)(b)	70 days before general election
Nev	July 20	298.109	25 working days before 2nd Fri in Aug
N H	August 9	655:43	34 days before primary election
N J	July 30	19: 13-9	99 days before general election
N M	September 11	1-8-52.C	56 days before general election
N Y	August 21	Election code 6-158.9	11 weeks before general election
N C	June 30	163-122	last Friday in June
N D	September 7	16.1-12-04	60 days before general election
Oh	August 23	3513.257	75 days before general election
Ok	July 15	10-101.1	date named in law
Ore	August 28	249.722(1)	70 days before general election
Pa	August 1	*Libt Pty v Davis* court order	date named in court order
R I	September 7	17-14-11	60 days before general election
S C	August 1	7-13-351	date named in law
S D	August 1	12-7-1, 12-7-1.1	first Tuesday in August
Tn	August 17	2-5-101(a)	thirdThursday in August
Tx	May 30	181.005(e), 181.061(c)	75 days after precinct conventions
Ut	August 31	administrative ruling	deadline accidentally deleted from code
Vt	September 20	Title 17, sec. 2386	47 days before general election
Va	August 24	24.2-543	74 days before general election
Wa	August 28	29.24.020	70 days before general election
W V	August 1	3-5-24	date named in law
Wis	September 5	8.20(8)(a)	first Tuesday in September
Wy	August 28	22-5-307	70 days before day before gen. elec.
DC	August 15	1-1312(f)	third Tuesday in August

In most states, the deadlines for new party and independent presidential candidates are the same. Where they differ, the later procedure is shown. Chart prepared June 12, 2002 by Richard Winger, Bx 470296, San Francisco Ca 94147; ban@igc.org; (415) 922-9779. If a deadline has been changed since 2000, the new deadline is shown as though it had existed in 2000. Changes were made in South Dakota and Washington.

BEST AVAILABLE COPY

Appendix I

2000 DEADLINES FOR INDP. OR NEW PARTY PRESIDENTIAL CANDIDATE

(2)

Supreme Court, U.S.
FILED
NOV 12 2002
OFFICE OF THE CLERK

No. 02-561

In The

Supreme Court of the United States

HARRY BROWNE and PETER SCHMERL,

Petitioners,

v.

BETSEY BAYLESS, Secretary of State of Arizona,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Arizona

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JANET NAPOLITANO
Arizona Attorney General

PAULA BICKETT
Chief Counsel for Civil Appeals

JOSEPH KANEFIELD*
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
1275 W. Washington
Phoenix, Arizona 85007
Telephone: (602) 542-3333
Counsel for Respondent
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does Arizona's nomination petition filing deadline for an independent candidate running for President of the United States, which fell on June 14, 2000, unconstitutionally burden the First and Fourteenth Amendment rights of the Libertarian Party's nominee for President who, because of an intra-party struggle for control of the Arizona Libertarian Party, filed his nominating petitions to run as an independent on August 17, 2000?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Authorities	iii
Statement of the Case	1
A. Factual Background	2
B. Procedural Background	3
Reasons to Deny the Petition	4
1. The Arizona Supreme Court Correctly Applied the Law in *Anderson* to the Facts Before It	4
2. No Conflict Exists Between the Decision Below and the Decisions of Other Federal Courts Addressing This Issue	12
3. Arizona's Filing Deadline for Independent Candidates Has Not Prevented Truly Independent Candidates and Candidates from Non-Major Parties from Obtaining Ballot Access	14
Conclusion	16

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Celebrezze, 460 U.S. 780 (1983) ..... *passim*

Burdick v. Takushi, 504 U.S. 428 (1992) 7, 13, 14

Burson v. Freeman, 504 U.S. 191 (1992) 10

Bush v. Gore, 531 U.S. 98 (2000) 11

Campbell v. Hull, 73 F.Supp. 2d 1081 (D.Ariz. 1999) 13

Council of Alternative Political Parties v. Hooks, 179 F.3d 64 (3rd Cir. 1999) 13

Hagelin for President Commission v. Graves, 25 F.3d 956 (10th Cir. 1994) 8, 9

Libertarian Party of Washington v. Munro, 31 F.3d 759 (9th Cir. 1994) 10

Munro v. Socialist Workers Party, 479 U.S. 189 (1986) 10, 13

Storer v. Brown, 415 U.S. 724 (1974) 7

Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997) 10, 13

U.S. Taxpayers Party v. Smith, 871 F.Supp. 426 (N.D. Fla. 1993) 13

Wood v. Meadows, 207 F.3d 708 (4th Cir. 2000) 13

STATUTES

A.R.S. § 16-311 ..... 3, 15

A.R.S. § 16-341 ..... 3, 9, 12

A.R.S. § 16-351 8

TABLE OF AUTHORITIES – Continued

Page

A.R.S. § 16-801 15

A.R.S. § 16-803 15

OTHERS

1999 Ariz. Sess. Laws, ch. 224 3

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Arizona Secretary of State Betsey Bayless, respectfully requests that this Court deny Harry Browne's and Peter Schmerl's Petition for a Writ of Certiorari seeking review of the Arizona Supreme Court's decision in this case.

STATEMENT OF THE CASE

This case concerns Arizona's filing deadline for independent presidential candidates, which the Arizona Supreme Court unanimously held was constitutional under the test in *Anderson v. Celebrezze*, 460 U.S. 780 (1983). The Arizona court found that Arizona's filing deadline did not impose a suspect or severe burden on the rights of independent voters because it was significantly closer to the date of the general election than the Ohio deadline struck down in *Anderson*. In addition, the court found Petitioner Browne's exclusion from the ballot was not caused by a filing deadline that discriminated against independents but by his failed attempt to be nominated by his party in Arizona. (Pet. App. 7a-8a). The court then determined that the filing deadline was rationally related to Arizona's important regulatory interests. (*Id.* at 10a-11a.)

The Arizona decision presents no reason for this Court to revisit *Anderson*. The decision is consistent with *Anderson* and the Court's subsequent ballot-access decisions. It does not conflict with another federal or state court decision. Finally, except for Browne, who filed too late because he failed in his attempt to be the Arizona Libertarian

nominee, Petitioners have not demonstrated that Arizona's deadline has prevented any national presidential candidate from obtaining ballot access.

A. Factual Background

In early 2000, Browne began his campaign for president in Arizona as a candidate of the Libertarian Party. (Pet. App. 3a.) However, the Arizona electors that supported Browne's nomination as the Libertarian Party presidential candidate, led by Petitioner Peter Schmerl, were enmeshed in an intra-party struggle for control of the Libertarian Party. (*See* Defs' Answering Brief at 5, *Browne v. Bayless*, No. 1 CA-CV 00-0546, Ariz. Ct. of App., filed March 2, 2001.) Mr. Schmerl asserted that he was the true Libertarian Party state committee chair and initiated at least two lawsuits seeking a court order to that effect. (*Id.*) As of June 14, 2000, the Maricopa County Superior Court had ruled that Mr. Schmerl was not the Libertarian Party chair. (*Id.*) Therefore, the Secretary of State refused Schmerl's petition nominating Browne as the Libertarian candidate and accepted those of the person whom the court held to be the recognized chair. (I.R.A. 6, Ex. 21; Pet. App. 35a, 48a.)

On July 2, 2000, the Libertarian Party nominated Browne for president at its national convention. (Pet. App. 3a.) Having failed to obtain his party's Arizona nomination, however, Browne attempted to file his designation of presidential electors and nominating petitions as an independent candidate with the Secretary of State on August 17, 2000. (I.R.A. 6, Ex. 20; *see also* IR 1, ¶ 13.) The Secretary of State refused to accept Browne's petitions because they were not timely. (*Id.*, Ex. 18.)

In Arizona, an independent candidate for president must obtain a specific number of signatures and file them with a petition listing the presidential electors that would vote for the candidate at the same time that new or recognized party candidates must file their slate of electors, without identifying their candidates. Ariz. Rev. Stat. Ann. (A.R.S.) § 16-341. Recognized party candidates must file their slate of electors "not less than ninety nor more than one hundred and twenty days before the primary election." A.R.S. § 16-311. In 2000, the deadline for filing nomination petitions was June 14, 2000. (Pet. App. 41a.)

The deadline for filing nominating petitions is necessary to allow the Arizona Supreme Court to resolve election challenges and the Secretary of State to prepare and print the final ballot in time for Arizona's early voting. (*Id.* at 10a-11a, 41a to 47a). Indeed, in 1999, the Arizona Legislature amended the filing deadline from seventy-five to ninety days to allow time to investigate, hear, and resolve election challenges. (1999 Ariz. Sess. Laws, Ch. 224, § 1; *see also* Pet. App. 45a).

B. Procedural Background

Petitioners Browne and Schmerl and one of Browne's prospective electors challenged the Secretary of State's refusal of Browne's nominating petition in a lawsuit alleging that the filing deadline was unconstitutional. (I.R.A. 1.) The Complaint requested declaratory and injunctive relief. *Id.*

The Superior Court for Maricopa County denied relief. (Pet. App. 25a-28a.) The court applied the *Anderson* test and found that Arizona's filing deadline did not impose a

severe burden on Petitioners' First and Fourteenth Amendment rights and that the State had sustained its burden of demonstrating a rational basis for the deadline. (*Id.* at 27a-28a.) The court noted Arizona's "greater and more widespread use of early balloting" and "the substantial administrative burden imposed upon election officials and the courts in carrying out the challenge process." (*Id.* at 28a.) The Arizona Court of Appeals reversed for the reasons stated in the Petition for Certiorari. (*Id.* at 13a-24a.)

The Arizona Supreme Court vacated the Arizona Court of Appeal's decision and, applying the test in *Anderson*, concluded that Arizona's filing deadline does not impose suspect or severe restrictions on Browne's First Amendment rights and furthers important regulatory interests of the State. (Pet. App. 2a.)

REASONS TO DENY THE PETITION

1. The Arizona Supreme Court Correctly Applied the Law in *Anderson* to the Facts Before It.

Petitioners argue that the Arizona Supreme Court "misapplied *Anderson*." (Pet. at 15.) There is no need to review the Arizona decision because the court correctly stated the rule of law in *Anderson* and applied that rule correctly.

As Petitioners acknowledge (Pet. at 15-16), the Arizona Supreme Court recognized that the *Anderson* test applied to Petitioners' challenge and correctly set forth the test. (Pet. App. 5a-6a.) The Court rarely grants review in these circumstances. *See* Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the

asserted error consists of . . . the misapplication of a properly stated rule of law.")

Moreover, the Arizona Supreme Court correctly applied the law in *Anderson* to the facts before it. The court held that the Ohio deadline in *Anderson* was significantly different from Arizona's deadline because it is 83 days closer to the general election and Arizona allows early balloting, which effectively starts the selection 33 days prior to election day. (Pet. App. 7a.) Thus, the effective period between the filing deadline and the election in Arizona is 113 days, compared with 229 days in Ohio. (*Id.*)[1]

In addition, the court noted Arizona's June filing deadline did not raise the concerns present in *Anderson* because the national political process has evolved towards a system whereby the identities and positions of the major party candidates are now largely determined before June. (*Id.* at 7-8.) Thus, the concern in *Anderson* that independent voters disaffected from existing political parties would not have sufficient time to coalesce into viable groups was not present in this case. (*Id.*) The court noted that this concern was not present because Browne was a member of the Libertarian Party in Arizona at least as late as June 14, 2000, and decided to run as an independent "only because he lost the internal party dispute – and not in response to events transpiring within the major political

[1] Petitioners erroneously suggest that, because Anderson did not have to collect signatures before Ohio's March deadline, the Court miscalculated the difference between the two deadlines. (Pet. 19-20 n.11.) Anderson collected approximately 14,500 signatures in Ohio. *Anderson*, 460 U.S. at 782. Thus, the Arizona Supreme Court correctly calculated how the Arizona deadline differed from the Ohio deadline.

parties." (*Id.* at 8a.) The court thus concluded that the deadline did not impose a "suspect burden" on the rights of independent voters. *Id.*

The court then analyzed the State's interest to determine if the restrictions were reasonable and nondiscriminatory. (*Id.* at 9a.) The State showed that it needed the time to prepare early ballots, sample ballots, and ballots for overseas voters not later than 33 days before the date of the general election, to prepare and print ballots that could be optically scanned, to translate the ballots into numerous Native American languages in order to comply with the Voting Rights Act, and to complete administrative and judicial review of election challenges. (*Id.* at 9a-11a.) The court concluded that "[w]hile the Secretary of State may not need the entire period of time allowed under § 16-351 [sic] [§ 16-341] to complete her duties in every election year, additional time clearly is necessary when electoral challenges and related court proceedings occur." (*Id.*)

Petitioners argue that the difference between the Ohio deadline and the Arizona deadline is not significant but cite no authority other than the language of *Anderson*. In fact, *Anderson* supports the court's conclusion. Anderson's supporters tendered a nominating petition containing approximately 14,500 signatures and a statement of candidacy to the Ohio Secretary of State on May 16, 1980. *Anderson*, 460 U.S. at 782. Although filed after Ohio's March 20, 1980 deadline, the documents would easily have satisfied Arizona's deadline. *Id.* This Court did not find a June filing deadline problematic. It noted that the deadlines in a number of states are in June or July. *Id.* at 795 n.20. Thus, the Arizona Supreme Court correctly

concluded that the Arizona statutory deadline was significantly different than the Ohio statute struck down in *Anderson*.

Petitioners also argue that the Arizona court incorrectly found that, unlike the facts in *Anderson*, independent voters were not affected by the State's rejection of Browne's nomination petition. (Pet. at 19 n.12.) However, the Petitioners' only support is their speculation that "Arizona's presidential ballot access scheme is not sufficiently flexible to accommodate developments in the political party nominating process." (*Id.*) Petitioners do not argue that in 2000 the June 14 deadline was invalid because the identities of the recognized party candidates were still unknown or likely to change. Thus, Petitioners' arguments are based purely on hypothetical burdens that they did not suffer. They have not shown that the deadline created such burdens for any other independent or minor-party candidate in Arizona.

Petitioners' argument also fails to recognize that this Court is concerned about the burden on independent voters, not party candidates who fail to garner the support of the electors in a single state. *See Burdick v. Takushi*, 504 U.S. 428, 437 (1992) (stating that the Court "gave little weight to 'the interests the candidate and his supporters may have in making a late rather than an early decision to seek independent ballot status'") (quoting *Storer v. Brown*, 415 U.S. 724, 736 (1974)).

Finally, Petitioners' argument that the petition filing deadline discriminates in favor of parties fails because

they ignore the real and substantial differences between party and independent candidates.[2] The Arizona Supreme Court correctly recognized that the national political process has evolved toward a system of ever-earlier presidential primary elections with the result that, by the middle of June in an election year, the identities and positions of the major party candidates have largely been determined. (Pet. App. 7a-8a.) Similarly, in *Hagelin for President Comm. v. Graves*, 25 F.3d 956, 960 (10th Cir. 1994), the Court of Appeals for the Tenth Circuit rejected the argument that Kansas's filing deadline was advantageous to major parties because it imposed no time limits on them to submit the names of their presidential nominees. *Id.*[3] Unlike independent candidates, party candidates must survive a primary and a national convention for their names to appear on the ballot. *Id.* Moreover, while an independent candidate can have his or her name placed on the ballot without any public exposure, the same cannot be

---

[2] Browne manufactures an argument that the calculation of Arizona's filing deadline is somehow flawed because it is tied to Arizona's primary election in which independents do not participate. (Pet. at 20.) The fact is, however, that the deadline was calculated to allow the election officials enough time to prepare the general election ballot and for the courts to resolve any challenges to independent candidacies. Calculating the deadline based on the primary election was just one way of setting the deadline. The Legislature could have arrived at the same date based on the general election.

[3] In fact, the identities of the major parties' candidates on the general election ballot may actually be finalized at approximately the same time as an independent candidate is assured of a place on the ballot. When the time for challenging nominating petitions is taken into account, an independent may only be fully qualified for the ballot in early to mid-August, approximately the same time the major parties hold their conventions to formally nominate their candidates. *See* A.R.S. § 16-351.

said for the major party candidates. *Id.* at 960; *Anderson*, 460 U.S. at 816 ("On the whole, party candidates have a more difficult chore in getting a place on the general election ballot than do nonparty candidates.") (Rehnquist, J., dissenting). The Arizona court correctly concluded that the deadline in A.R.S. § 16-341 did not impose a suspect or severe burden on independent voters.

Petitioners also take issue with the lower court's analysis of the State's interests. However, they erroneously assert that the court considered a state interest of equal treatment. (Pet. at 20.) The State did not raise, and the lower court did not discuss, this interest.

Petitioners do not dispute the importance of the State's interest in having adequate time to prepare and print ballots and to allow for resolution of legal challenges to petitions. (Pet. at 21.) Petitioners simply argue that the tasks do not require the amount of time provided by the Legislature.[4] This argument fails because this Court does not require the State to determine with exact precision the time needed before a general election to complete its administrative and judicial tasks. Rather, it is within the Legislature's discretion to use its foresight to establish a filing deadline that will allow the election officials time to prepare for the election and the courts time to resolve any

[4] It is undisputed that an August 17th filing date (the date that Browne's petitions were ready) would not provide sufficient time for the court to resolve election disputes and the Secretary of State to prepare and print the ballots. (Pet. App. 46a-47a.) Moreover, according to Petitioners' own expert, Browne's August 17th petition would have been untimely in twenty-seven other States. (Pet. App. 59a.) Thus, the Petition clearly does not present facts that warrant the Court's revisiting the issue of what is an unnecessarily burdensome filing date.

challenges. This Court has rejected the need for such precision:

> The State's asserted regulatory interests need only be "sufficiently weighty to justify the limitation" imposed on the party's rights. [citations omitted.] Nor do we require elaborate, empirical verification of the weightiness of the State's asserted justifications. *See Munro v. Socialist Workers Party*, [479 U.S. 189, 195-196 (1986)] ("Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights").

Timmons v. Twin Cities Area New Party, 520 U.S. 351, 364 (1997); *Burson v. Freeman*, 504 U.S. 191, 208-09 (1992); *see also Libertarian Party v. Munro*, 31 F.3d 759, 764 (9th Cir. 1994) (the Constitution does not require that a state adopt the most efficient system possible; "it need only adopt a system that is rationally related to achieving its goals"). Thus, the Arizona Supreme Court correctly applied *Anderson* in concluding that "[w]hile the Secretary may not need the entire period of time allowed under § 16-351 [sic] [§ 16-341] to complete her duties in every election year, additional time clearly is necessary when electoral challenges and related court proceedings occur." (Pet. App. 11a.)

Similarly, Petitioners' argument that the State's justifications for the June deadline are not sufficient because the former filing deadline for presidential independent candidates was in September lacks merit. First, election challenges have increased. As the Arizona Supreme Court noted, "it was precisely because the law did not allow sufficient time to complete the challenge process

as a practical matter that the Legislature moved the deadline back an additional 15 days in 1999." (Pet. App. 10a-11a.) In fact, the Arizona Supreme Court heard no fewer than seven petition challenges during the 2000 election that took between thirty-seven and sixty-three days to resolve. (*See* Secretary of State's Supplemental Brief, at 10 n.6, *Browne v. Bayless*, No. CV01-0383-pr, Ariz. Supreme Ct., filed February 11, 2002.) Many more challenges were filed. Petitioners even acknowledge the pressure placed on the courts by ballot-access challenges. (Pet. at 14-15). Second, the State's administrative burdens have increased significantly over the past eighty years. For example, early balloting and compliance with the Voting Rights Act play a larger role in Arizona elections.[5] Further, most of the voters in Arizona now vote on optical scan ballots rather than punch card ballots. (*See* Defs.' Answering Brief at 14, *Browne v. Bayless*, No. 1 CA-CV 00-0546, Ariz. Ct. of App., filed March 2, 2001.) Although the printing process for these ballots is lengthy,[6] they have a lower error rate than punch card ballots. (*See* Defs.' Answering Brief at 14-15, *Browne v. Bayless*, No. 1 CA-CV 00-0546, Ariz. Ct. of App., filed March 2, 2001.); *Bush v. Gore*, 531 U.S. 98, 126 n.4 (2000) (Stevens, J., dissenting).

---

[5] Arizona became a covered jurisdiction under the Voting Rights Act on November 1, 1972. 40 Fed. Reg. 43746 (September 23, 1975).

[6] In 2000, for example, Maricopa County ordered its optical scan ballot paper on July 1, 2000, shortly after it determined how many candidate slots would appear on the ballot. (Pet. App. 44a.) Petitioners dismiss this administrative task as "trivial" even though the undisputed record established that it was necessary to assure the ballots were printed on time. (*Id.* at 43a-44a.)

Finally, the pre-1993 filing deadline for independent candidates was arguably more burdensome than the current candidate deadline. A candidate had only ten days after the primary election to gather signatures from electors who had neither voted in the primary nor signed another candidate's petition. (*See* Defs.' Answering Brief at 16, *Browne v. Bayless*, No. 1 CA-CV 00-0546, Ariz. Ct. of App., filed March 2, 2001.) Now independents have the same time to gather signatures as party candidates and may obtain signatures from electors who have not signed another nominating petition for the same office regardless of whether they vote in the primary. A.R.S. § 16-341(C). In changing the deadline, the Arizona Legislature relied on testimony that established that the burdens under the then-existing filing deadline were significant. A supporter of Ross Perot, the 1992 independent candidate for President, testified in favor of changing the deadline and stressed the difficulty his group had gathering petition signatures in the ten days following the primary. (*See* Defs.' Answering Brief at 17, *Browne v. Bayless*, No. 1 CA-CV 00-0546, Ariz. Ct. of App., filed March 2, 2001.)

Because the Arizona Supreme Court correctly applied the law in *Anderson* to the facts in this case, there is no reason for this Court to revisit the issue.

2. No Conflict Exists Between the Decision Below and the Decisions of Other Federal Courts Addressing This Issue.

Petitioners do not argue that the decision below conflicts with any other federal or state court decision. They suggest, however, that the decision is an anomaly. It is not.

The decision below is consistent with this Court's ballot access cases decided after *Anderson*. *See Timmons*, 520 U.S. at 364, 369-70 (applying the *Anderson* balancing test to uphold Minnesota's fusion ban because the burden on First Amendment association rights was justified by the State's interests in ballot integrity and political stability); *Burdick*, 504 U.S. 436-37 (applying the *Anderson* test to uphold Hawaii's ban on write-in voting and finding the ban was justified by the State's interests in preserving ballot integrity and "averting divisive sore-loser candidacies"); *Munro*, 479 U.S. at 196 (holding Washington's requirement that a minor-party candidate for partisan office receive at least one percent of all votes cast in the primary election in order to appear on the general election ballot did not violate First Amendment based on the State's interest in avoiding the possibility of unrestrained factionalism).

The decision below is also consistent with other federal court decisions upholding independent petition filing deadlines similar to Arizona's. *See Wood v. Meadows*, 207 F.3d 708, 716 (4th Cir. 2000) (upholding a June deadline for non-presidential independents); *Council of Alternative Political Parties v. Hooks*, 179 F.3d 64, 74 (3d Cir. 1999) (same); *Campbell v. Hull*, 73 F.Supp. 2d 1081, 1087 (D.Ariz. 1999) (finding that Arizona's prior deadline of June 27 did not, by itself, constitute an impermissible burden on the rights of independent voters); *U.S. Taxpayers v. Smith*, 871 F.Supp. 426, 437 (N.D. Fla. 1993) (upholding a filing deadline for independent presidential candidates of July 15).

Because there is no conflict in the manner that the lower courts have applied *Anderson*, there is no reason for this Court to revisit the issue.

3. Arizona's June Filing Deadline for Independent Candidates Has Not Prevented Truly Independent Candidates and Candidates from Non-Major Parties from Obtaining Ballot Access.

Browne's historical argument about the importance of independent candidacies for president far from establishes that Arizona's filing deadline interferes in any way with these candidacies. (Pet. at 13.) To the contrary, candidates representing views outside the "major political parties" have had little problem obtaining ballot access in Arizona. Although no "independent" has run for president in Arizona since the filing deadline was moved to June in 1993, individuals such as Ross Perot, Pat Buchanan, and Ralph Nader, whom Petitioners include in the category of independents or "non-major party" candidates, have easily obtained ballot access in Arizona by simply establishing new parties.[7] *See Burdick,* 504 U.S. at 436-37 (holding that Hawaii's system for ballot access, which included laws recognizing new parties similar to those in Arizona, provided for easy access to the ballot until the cutoff date for the filing of nominating petitions, two months before the primary and concluding that "any burden on voters' freedom of choice and association is borne only by those who fail to identify their candidate of choice until days before the primary").

---

[7] In Arizona, Ross Perot was the 1996 nominee of the newly recognized Reform Party (*see* Arizona Sec'y of State, 1996 Election Canvass, available at http://www.sosaz.com/election/1996/General/Canvass1996GE.pdf); Ralph Nader was the 1996 and 2000 nominee of the Green Party (*id.*; Arizona Sec'y of State, 2000 Election Canvass, available at http://www.sosaz.com/election/2000/General/Canvass2000GE.pdf); and Pat Buchanan was the 2000 nominee of the Reform Party. (*Id.*)

Moreover, contrary to Petitioners' assertion, it is far from "virtually impossible for a reasonably diligent independent candidate to secure access to the Arizona ballot." (Pet. at 14.) Many candidates have obtained ballot access as "independents" for state offices by filing their petitions by the June deadline, including four candidates that appeared on the November 5, 2002 general election ballot. (*See* Defs.' Answering Brief at 9-10, *Browne v. Bayless*, No. 1 CA-CV 00-0546, Ariz. Ct. of App., filed March 2, 2001; Arizona Sec'y of State, 2002 Ballot, available at http://www.sosaz.com/election/2002/General/FullListing.htm.) The candidates obtained a specific number of signatures and submitted them to the relevant county recorder for verification no later than 140 days prior to the primary election. A.R.S. §§ 16-311, -801 and -803.

Because Petitioners have not shown that Arizona's petition filing deadline interferes with the ability of national candidates outside of the major parties to obtain ballot access, there is no need to grant a review.

CONCLUSION

This Court should deny the Petition for a Writ of Certiorari.

Respectfully Submitted,

JANET NAPOLITANO
Arizona Attorney General

PAULA BICKETT
Chief Counsel for Civil Appeals

JOSEPH KANEFIELD*
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
1275 W. Washington
Phoenix, Arizona 85007
Telephone: (602) 542-3333
Counsel for Respondent
**Counsel of Record*

November 12, 2002

(3)

Supreme Court, U.S.
FILED
NOV 26 2002
OFFICE OF THE CLERK

No. 02-561

IN THE

Supreme Court of the United States

HARRY BROWNE and PETER SCHMERL,

Petitioners,

v.

BETSEY BAYLESS, Secretary of State of Arizona,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

REPLY BRIEF

NANCY NORTHUP
Counsel of Record
KIM BARRY
BRENNAN CENTER FOR JUSTICE
AT NEW YORK UNIVERSITY SCHOOL OF LAW
Attorneys for Petitioners
161 Avenue of the Americas
12th Floor
New York, New York 10013
(212) 998-6730

xx

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

17 pp

QUESTION PRESENTED

Whether a state may, consistent with the First and Fourteenth Amendments as construed in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), require an independent candidate for President of the United States to qualify for the ballot almost five months before the general elections and three months before an established political party must designate its presidential candidate, where the state admits that it does not need that amount to time for its election administration.

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Cited Authorities iv

Introduction 1

I. In the Presidential Election Nomination Process, the First Amendment Requires That a State's Independent Candidate Option Be Available As Late As Practicable So Voters Can Respond to Unfolding Events. 2

A. Harry Browne Did Not Lose an Intra-Party Struggle; He Sought an Independent Ballot Line After Arizona Erroneously Accepted the Electors of a Person Later Held Not to Legally Represent the Party. 2

B. The Constitutionality of a State's Independent Candidate Ballot Deadline Does Not Turn on Whether a Candidate Utilizing the Option Is "Truly Independent," but on Whether the Deadline Allows Voters to Respond to Events in the Party Nominating Process—Whether the Party Is a Major or Minor One. 4

Contents

Page

II. While a State Need Not Establish with "Exact Precision" the Petitioning Deadline for the General Election Ballot, Arizona Has No Justification for Requiring 146 Days to Resolve Challenges to Independent Candidate Petitions When It Resolves Challenges to Party Primary Petitions in 90 Days. 7

Conclusion 10

TABLE OF CITED AUTHORITIES

Page

Cases:

Anderson v. Celebrezze, 460 U.S. 780 (1983) .... *passim*

Arizona Libertarian Party v. Schmerl, 28 P.3d 848 (Ariz. Ct. App. 2001) 2, 3

Campbell v. Hull, 73 F. Supp. 2d 1081 (D. Ariz. 1999) 6, 7

Council of Alternative Political Parties v. Hooks, 179 F.3d 64 (3d Cir. 1999) 6

Storer v. Browne, 415 U.S. 724 (1974) 1

Williams v. Rhodes, 393 U.S. 23 (1968) 5

Wood v. Meadows, 207 F.3d 708 (4th Cir. 2000) ... 6

Cited Authorities

	Page
United States Constitution:	
First Amendment	2, 6
Statutes:	
A.R.S. § 16-201	8
A.R.S. § 16-311	8
A.R.S. 16-341	*passim*
A.R.S. § 16-542	9
A.R.S. § 16-801	6
A.R.S. § 16-803	6
Vt. Stat. Ann. tit. xvii, § 2386 (2000)	10
Voting Rights Act, 40 Fed. Reg. 43746 (Sept. 23, 1975)	10

INTRODUCTION

The issue presented in this writ of certiorari is one of national importance, involving not only the presidential election process, but the constitutionality of a state's restrictions on a candidate's ability to secure a place on the general election ballot as an independent. The independent candidate option is a constitutionally protected one, *see Storer v. Browne*, 415 U.S. 724, 745-46 (1974), and acts as a safety valve for voters to support candidates who emerge outside the party scheme as independents in reaction to events that unfold in an election campaign. *See Anderson v. Celebrezze*, 460 U.S. 780, 791-93 (1980). In presidential election campaigns, where the contest is nationwide and the laws of one state affect voters beyond its own borders, the independent ballot option is particularly important. *See id.* at 795 (1983). As explained in the Petition for a Writ of Certiorari, Arizona has the second earliest filing deadline in the nation for independent presidential candidates.

In an effort to diminish the importance of the constitutional issue presented by that deadline, Respondent, the State of Arizona, attempts to cast this as a case about a "sore loser" of an intra-party struggle trying to get on the ballot as an independent, and argues that the independent line should be reserved for the "truly independent" candidate (Br. Opp. Cert. 14). The first assertion is incorrect as a matter of fact; the second rests on a flawed principle of law as it would inject into the constitutional analysis of a state's independent presidential candidate route an impermissible inquiry into a candidate's political beliefs. Neither supports denying review of the important constitutional question raised by Arizona's requirement that independent candidates qualify for the ballot almost five months before the general election. Respondent further seeks to avoid review by asserting that Arizona need not establish its independent filing deadline with "exact precision" (Br. Opp. Cert. 9). While states are accorded flexibility in administering their election systems, that flexibility does not insulate from constitutional scrutiny regulations that cannot be

rationally justified and that impose unwarranted burdens on the rights of candidates and their supporters.

I. In the Presidential Election Nomination Process, the First Amendment Requires That a State's Independent Candidate Option Be Available As Late As Practicable So Voters Can Respond to Unfolding Events.

As we saw once again in the 2002 election cycle, unforeseen events as an election year unfolds can fundamentally affect political expectations.[1] Given the inevitable and unpredictable events in the major and minor party nominating process, the First Amendment requires that states' ballot access laws keep available as late as practicable meaningful options for voters to react to developments by supporting a candidate as an independent.

A. Harry Browne Did Not Lose an Intra-Party Struggle; He Sought an Independent Ballot Line After Arizona Erroneously Accepted the Electors of a Person Later Held Not to Legally Represent the Party.

To obscure the fact that Harry Browne was a national candidate on the ballot in 49 states, Arizona seeks to cast this as a case about a candidate "who filed too late" to become an independent candidate "because he failed in his attempt to be the Arizona Libertarian nominee" (Br. Opp. Cert. at 1-2). Absent from Respondent's brief, however, is the undisputed fact that the reason Browne failed to get the Libertarian ballot line in Arizona is that the Secretary of State erroneously gave the line to the electors of a person later held not to represent the Arizona Libertarian Party. *See Arizona Libertarian Party v. Schmerl*, 28 P.3d 848 (Ariz. Ct. App. 2001) (effectively upholding Petitioner and Browne supporter Peter Schmerl's claim to office of State Chair of the Libertarian Party in Arizona).

---

1. Three confirmed candidates for Congress, already on the ballot for the November 5, 2002 election, were removed, following the deaths of two (Paul Wellstone on October 25 and Patsy Mink on September 29), and the withdrawal of the third (Robert Torricelli on September 29).

Harry Browne did not lose an intra-party feud. He won by a landslide (with 78% of the vote) the non-binding Libertarian Party presidential primary in Arizona; he secured his party's nomination for President at its 2000 national convention; and his supporters eventually won their lawsuit over who properly represented the Arizona Libertarian Party. *See Browne v. Bayless*, 46 P.3d 416, 417 (Ariz. 2002); *Arizona Libertarian Party*, 28 P.3d at 956-57. Browne's supporters timely filed with the Arizona Secretary of State nomination papers for their slate of presidential electors. (Pet. Br. App. E at 35a.) But a competing slate of Libertarian electors also filed, and the Secretary of State determined to put the competing slate on the ballot. (Pet. Br. App. E at 36a.) Browne's supporters eventually prevailed in the legal dispute about who represented the Party—but not in time for the 2000 election. *See Arizona Libertarian Party*, 28 P.3d at 957. Browne did not just rely on legal action to rectify the situation, however, he sought placement on the ballot as an independent. In so doing, he gathered sufficient petition signatures to demonstrate the necessary voter support Arizona requires. Because the events that precipitated Browne's independent candidacy occurred after Arizona's early filing deadline had passed, however, Browne was barred from the 2000 presidential race in that state. Browne's Arizona supporters—alone in the entire country—could not cast a ballot for him. This is not a "hypothetical burden" (Br. Opp. Cert. at 7). Arizona's early independent filing deadline, Browne's only route to the ballot in light of Arizona's erroneous decision about the Libertarian electors, heavily burdened the freedom of choice and freedom of association of Browne's supporters in the 2000 presidential election.

B. The Constitutionality of a State's Independent Candidate Ballot Deadline Does Not Turn on Whether a Candidate Utilizing the Option Is "Truly Independent," but on Whether the Deadline Allows Voters to Respond to Events in the Party Nominating Process—Whether the Party Is a Major or Minor One.

In elections for the President of the United States, states have a special obligation to ensure that *all* candidates—partisan and independent—can respond to "intervening events [that] create unanticipated political opportunities," *Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983). The major parties retain ultimate flexibility by adopting their presidential nominees and platforms late in the election cycle—as late as Labor Day for the Republicans in 2004.[2] Consistent with the rationale of *Anderson*, the overwhelming majority of states permit comparable flexibility for independents by allowing them to file their candidacies between late July and mid-September. (*See* Pet. Br. App. I, Chart.) Arizona's mid-June filing deadline—the second earliest in the country—prevents independent candidacies from emerging in the wake of events transpiring in the party nominating process thereby constraining the "availability of political opportunity" *see Anderson*, 460 U.S. at 793 (internal quotation omitted).

In *Anderson*, this Court found that Ohio's filing deadline for independent presidential candidates imposed a distinctive, substantial, and ultimately unsupportable burden on the rights of voters because it prevented "a late emerging Presidential candidate outside the major parties whose position on the issues could command widespread community support," from getting on the state general election ballot. *Id.* at 792-93. This Court explicitly recognized that the inevitably shifting nature of events in an election year demands that states have in place a safety

---

2. In 2004, the Republican National Convention will not be held until August 31-September 2 and the Democratic Party will convene July 26-29.

valve mechanism for both partisan and independent voters to respond and react:

> In election campaigns, particularly those which are national in scope, the candidates and the issues simply do not remain static over time. Various candidates rise and fall in popularity; domestic and international developments bring new issues to center stage and may affect voters' assessments of national problems. Such developments will certainly affect the strategies of candidates who have already entered the race; they may also create opportunities for new candidacies.

Id. at 790 (citation omitted).

It was the event of Arizona's erroneous rejection of Petitioner Schmerl's presidential electors that ultimately kept Browne from the Libertarian line in Arizona in 2000 and gave rise to the need for him to run as an independent. Yet Arizona's early filing deadline for independent candidates prevented Browne's voters from reacting to this development. That the development occurred in a minor rather than a major party nomination process is not germane to the constitutional analysis. *Cf. Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (upholding as fundamental "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.") What matters is whether the supporters of candidates with a modicum of support can express their political preferences by placing their candidate on an independent line.

Respondent would reserve the independent line only for the "truly independent" (Br. Opp. Cert. 14). As a practical matter, and as detailed in the petition for certiorari, many presidential candidates running outside the major parties get on the ballot nationwide by running as minor party candidates in some states and independent candidates in others. (Pet. Br. at 7-8.) Moreover, the notion that those not "truly independent" from a political party have no constitutional right to access an independent line

would entangle courts in scrutinizing a candidate's political beliefs—a concept anathema to the First Amendment.[3]

Nor is the Secretary of State correct that the decision below is "consistent with other federal court decisions upholding independent petition filing deadlines similar to Arizona's" (Br. Opp. Cert. at 13). Two of the three cases cited in support of this proposition are inapposite as they involve independent candidates in non-presidential races. (*Id.*, *citing Wood v. Meadows*, 207 F.3d 708, 716 (4th Cir. 2000) (upholding a June deadline for non-presidential independents); *Council of Alternative Political Parties v. Hooks*, 179 F.3d 64, 74 (3d Cir. 1999) (same)). Those elections do not implicate the rights of voters outside the state nor do they burden candidates with a 50-state ballot access process. Although all independent candidates are entitled to First Amendment protection, the degree of protection necessarily varies with the political office sought. *See Alternative Political Parties*, 179 F.3d at 73 (recognizing that unlike the statute at issue in *Anderson*, "the statute here applies to state and local elections, rather than the national presidential election, and therefore the State's interest is appreciably greater"). The third case cited, *Campbell v. Hull*, 73 F. Supp. 2d 1081, 1092 (D. Ariz. 1999), explicitly did not

3. Arizona cannot defend its early filing deadline for independent candidates by asserting that Browne could "have easily obtained ballot access in Arizona by simply establishing [a] new part[y]." (Br. Opp. Cert. at 14.) Browne was not seeking to abandon the Libertarian Party by forming a new splinter party. He should not be forced to form a new association rather than use an independent option to allow his supporters to express their ballot choice. In any case, "new parties" seeking a place on the ballot face an even earlier filing deadline in Arizona than independent candidates. Under A.R.S. § 16-801, an organized party and its candidates may gain access to the ballot by achieving "new party recognition." To be recognized, a party must garner a specific number of signatures and submit them to the relevant county recorder for verification no later than 112 days prior to the primary election. *Id.*; A.R.S. § 16-803. This option was plainly unavailable to Browne on June 20 when the Secretary of State erroneously rejected his supporters' nomination papers.

uphold the constitutionality of Arizona's early filing deadline as that issue was not before the court. *Id.* ("[T]he Court will rule only on the constitutionality of A.R.S. § 16-341(C), the restriction on support from major party-affiliated voters.").

Similarly misplaced is Arizona's reliance on the successful ballot access of non-presidential independent candidates in the 2002 election to support its argument that the requirements of A.R.S. § 16-341 are reasonable. That four candidates out of a total of 206 for electoral office in 2002 were independents is strong support for Petitioners' argument that it is virtually impossible for a reasonably diligent independent candidate to secure access to the Arizona ballot. There has never been an independent presidential candidate in Arizona since the 1996 amendment. The figures are almost as dismal for independents running for state and national offices in the same period: two were candidates in 1996, one in 1998, and three in 2000. (*See Browne v. Bayless*, Sec'y State Supp. Br., No. CV-01-0383-PR, App. A at 4.)

II. While a State Need Not Establish with "Exact Precision" the Petitioning Deadline for the General Election Ballot, Arizona Has No Justification for Requiring 146 Days to Resolve Challenges to Independent Candidate Petitions When It Resolves Challenges to Party Primary Petitions in 90 Days.

Arizona defends its June 14, 2000, filing deadline for independent candidates as "necessary to allow the Arizona Supreme Court to resolve election challenges and the Secretary of State to prepare and print the final ballot in time for Arizona's early voting" (Br. Opp. Cert. at 3),[4] and argues that the date

---

4. The sole official explanation in the record for the 1996 amendment, however, which moved the deadline from 10 days after the primary to 75 days before the primary, was "to allow an independent candidate to file his nominating petition at the same time as candidates from other political parties. (*See* Defs.' Resp. to Special Action at 19, *Browne v. Bayless*, No. CV-00-0327 (Ariz. Sup. Ct., filed Sept. 12,

(Cont'd)

chosen to perform those functions need not be determined with "exact precision" (Br. Opp. Cert. at 9). Petitioners recognize that resolving ballot disputes is a legitimate regulatory interest, and that states have some leeway in establishing cut-off dates. *See, e.g.*, *Anderson*, 460 U.S. at 788. However, the regulatory interest in resolving ballot disputes does not inoculate any date the state chooses from constitutional challenge. The date must be reasonable in light of the interest and the work the state needs to carry out. *Id.* at 796.

Here the Secretary of State conceded that she does not need 146 days before the November election to prepare the Arizona presidential ballots. *Browne v. Bayless*, 25 P.3d 749, 753 (Ariz. Ct. App. 2001). Even without this admission, the fact that Arizona has imposed the same deadline for filing petitions for a place on the primary election ballot as for the general election ballot establishes that the deadline for the general election ballot is not reasonable *on its face*.[5] The state argues that its early deadline is necessary because "election challenges have increased," and that this fact led to the 1999 amendment to the election code moving the filing deadline for candidates back an additional 15 days. (Br. Opp. Cert. at 10).[6] However, the legislative history is clear that the need for more time to resolve ballot disputes concerned the September *primary* election, not the November *general* election. (*See* Defs.' Resp. to Special

---

(Cont'd)

2000).) In light of the undeniably different burdens the statute places on independent and partisan candidates, this "equal treatment" justification has no merit. (*See* Pet. Br. at 20-21; *but see* Br. Opp. Cert. at 9 (claiming that the State "did not discuss this interest" in proceedings below).)

5. The primary takes place eight weeks prior to the general election, A.R.S. § 16-201, and the filing deadline is 90 days before that, A.R.S. § 16-311(A); 16-341(C).

6. The state cites seven petition challenges during the 2000 election, none of which involved independent presidential candidates, and all of which were resolved before the primary, as the legislature intended when it amended the statute. (Br. Opp. Cert. at 11 (citations omitted).)

Action at 19, *Browne v. Bayless*, No. CV-00-0327 (Ariz. Sup. Ct., filed Sept. 12, 2000).)[7] Arizona has never explained why challenges to the nominating petitions of independent presidential candidacies have to be resolved well in advance of the September primary when presidential candidates do not compete in the primary. The only deadline of any relevance to independent presidential candidates is the general election on the first Tuesday in November. Ballots for that election go to print around September 17. (*See Browne v. Bayless*, No. CV-01-0383-PR, Sec'y State Supp. Br. App. A at 10 (Ariz. S. Ct., filed Feb. 11, 2002).)

There is no rational basis for the state to require 90 days to resolve election challenges and ready the primary ballot, but 146 days for resolution of the miniscule number of potential challenges to petitions of independent presidential candidates and preparation of the general election ballot. The State has not suggested that it is subject to a wholly different set of administrative tasks in the primary compared to the general election. Early balloting, compliance with translation obligations of Section 5 of the Voting Rights Act, and printing optical scan ballots are as much features of the primary as the general election. *See, e.g.*, A.R.S. § 16-542(A) (requests for an official early ballot may be made "before any election;" military and overseas ballots must be ready 45 days before the election); Voting Rights Act, 40 Fed. Reg. 43746 (Sept. 23, 1975); (*Browne*

---

7. The State offers no support for its assertion that "the deadline was calculated to allow the election officials enough time to prepare the general election ballot and for the courts to resolve any challenges to independent candidacies" (*Id.* at 8 n.2.) Nor can it. The record is devoid of any evidence of concern with the general election or independent presidential candidacies. Similarly unsupported and untenable is the State's novel argument that "[c]alculating the deadline based on the primary election was just one way of setting the deadline. The Legislature could have arrived at the same date based on the general election." *Id.* The only issue before this Court is the constitutionality of A.R.S. § 16-341 which reflects what the Legislature did, and not what else it could have done.

v. Bayless, No. CV-01-0383-PR, Sec'y State Supp. Br. App. A at 6 (Ariz. S. Ct., filed Feb. 11, 2002) ("Most of the voters in Arizona now vote on optical scan ballots rather than punch card ballots."). The Secretary of State has never specified the amount of time she needs to complete any of these tasks. Despite repeated requests from Petitioners at every level of the proceedings below, Arizona has also consistently failed to explain why tasks it needed 46 days to complete for every presidential election from 1909-1996, it now needs 146 days to finish.

What we do know is that the majority of states are subject to similar pre-election administrative demands and yet manage to prepare their general election ballots every four years in a timely fashion despite filing deadlines for independent presidential candidates that fall as late as September 20th. *See* Vt. Stat. Ann. tit. xvii, § 2386 (2000) (setting deadline for independent presidential candidates 47 days before general election). Approximately forty states satisfy administrative requirements while allowing independent presidential candidates to file papers in August and September. (*See* Pet. Br. at App. I, Chart.) More importantly, Arizona itself timely prepared the general election ballot for eighty years despite a filing deadline for independents that fell in mid-September, ten days *after* the primary. For much of that time, Arizona had to translate election materials pursuant to the Voting Rights Act—to which it became subject in 1972, 40 Fed. Reg. 43746 (Sept. 23, 1975)—and had effective "early balloting" in the sense that it had to prepare absentee and overseas ballots in advance of the general election date.

Petitioners do not dispute Arizona's description of its requisite administrative tasks; but they do contend that the State's administrative justification for the June filing deadline is not applicable to independent presidential candidates.

CONCLUSION

For these reasons and those set forth in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

NANCY NORTHUP
Counsel of Record
KIM BARRY
BRENNAN CENTER FOR JUSTICE
AT NEW YORK UNIVERSITY SCHOOL OF LAW
Attorneys for Petitioners
161 Avenue of the Americas
12th Floor
New York, New York 10013
(212) 998-6730